Supreme Court, U.S.
FILED
OCT - 9 2001
01 612

No. _____

In the
SUPREME COURT OF THE UNITED STATES

Alan Brown and Lois Brown,
Petitioners,

v.

Joseph Cicherski, Wilson County Animal Control Officer; Joe D. Tackitt, Wilson County Sheriff, Jason Price, Wilson County Sheriff's Deputy; and Christopher Ayala, Wilson County Sheriff's Deputy
Respondents.

On Petition Of Writ of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. On interlocutory appeal to a U.S. Circuit Court is a 42 U.S.C. §1983 claimant entitled to have the constitutionality of his claims decided before the claims are dismissed pursuant to the defense of qualified immunity because the claims are not clearly established?

2. Does a U. S. Circuit Court have jurisdiction on interlocutory appeal to dismiss 42 U.S.C. §1983 claims without specifically addressing them in its opinion when the claims were never raised by respondents in motions for summary judgment or addressed by the District Court in its orders denying summary judgment and when the only § 1983 claim actually raised is dismissed by the Circuit Court based solely on the sufficiency of the evidence without any discussion of the matters of law pertaining to the claim?

3. Is the Fourth Amendment violated when, pursuant to the TEXAS HEALTH AND SAFETY CODE § 821.021 et seq., officers execute a seizure warrant for 100+ dogs by utilizing the participation of several dozen animal activist and media without the officers first ascertaining the identities of the activists, or controlling their access to the breeders' home and farm, or inventorying the animals as they are removed from the premises by the activists, thus leading to the theft of several animals?

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The decision of the three-judge panel of the Fifth Circuit Court of Appeals is not reported, but is reproduced in Appendix A of this Petition.

The Order of the United States District of Texas, San Antonio Division pertaining to the summary judgment motion of respondents Christopher Ayala, Jason Price and Joseph Cicherski was not published, but is reproduced in Appendix B of this Petition.

The Order of the United States District of Texas, San Antonio Division pertaining to the summary judgment motion of respondent Joe Tackitt was not published, but is reproduced in Appendix C of this Petition.

The Memorandum and Recommendation of the United States Magistrate Judge for the United States District of Texas, San Antonio Division pertaining to the summary judgment motion of respondents Christopher Ayala, Jason Price and Joseph Cicherski was not published, but is reproduced in Appendix D of this Petition.

The Memorandum and Recommendation of the United States Magistrate Judge for the United States District of Texas, San Antonio Division pertaining to the summary judgment motion of respondent Joe Tackitt was not published, but is reproduced in Appendix E of this Petition.

The Order of the United States District of Texas, San Antonio Division pertaining to the 12(b)(6) motions of all respondents was not published, but is reproduced in Appendix F of this Petition.

The decision of the three-judge panel of the Fifth Circuit Court of Appeals denying petition for rehearing was not published, but is reproduced in Appendix G of this Petition.

JURISDICTION

The judgment of the three-judge panel of the Fifth Circuit Court of Appeals was entered on May 28, 2001. The order of the three-panel of the Fifth Circuit Court of Appeals denying petition for rehearing was entered on July 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TEX. HEALTH & SAFETY CODE § 821.021 (2000) provides:

§ 821.021. Definition:

In this subchapter, "cruelly treated" includes tortured, seriously overworked, unreasonably abandoned, unreasonably deprived of necessary food, care, or shelter, cruelly confined, or caused to fight with another animal.

TEX. HEALTH & SAFETY CODE § 821.022 (2000) provides:

§ 821.022. Seizure of Cruelly Treated Animal

(a) If a county sheriff, constable, or deputy constable or an officer who has responsibility for animal control in a municipality has reason to believe that an animal has been or is being cruelly treated, he may apply to a justice court in the county or to a municipal court in the municipality in which the animal is located for a warrant to seize the animal.

(b) On a showing of probable cause to believe that the animal has been or is being cruelly treated, the court shall issue the warrant and set a time within 10 days of the date of issuance for a hearing in the court to determine whether the animal has been cruelly treated.

(c) The officer executing the warrant shall cause the animal to be impounded and shall give written notice to the owner of the animal of the time and place of the hearing.

STATEMENT OF THE CASE

The questions presented by this case concern far more than the constitutionality of the specific conduct of the respondents regarding the manner in which they executed a seizure warrant. Certainly, this case raises the important question of whether the constitution prohibits county officials from allowing a horde of uncontrolled and unidentified activists to remove private property without taking an inventory of the property before it is removed.

More importantly, however, this case raises the question of the extent in which a Circuit Court is allowed to shield not only the respondents from the legal consequences of their own unconstitutional actions, but also any officials who instigate the same conduct in the future. While the defense of qualified immunity does protect official defendants from suits arising from their unconstitutional conduct if the constitutionality of the conduct is not clearly established at the time of the occurrence, the general public is also protected from the same conduct in the future when the Circuit Court is required, on appeal, to establish the constitutionality of the conduct before dismissing the claims based on the qualified immunity defense. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Additionally, this case presents the jurisdictional question of an interlocutory appeal when the Circuit Court dismisses claims that were never raised by the respondents in their motions before the District Court and when the only issue actually raised is dismissed based solely on the sufficiency of the evidence.

I. The Facts.

The facts of this case are so undeniably compelling that the Fifth Circuit could not have supported its opinion if it had actually recited them; thus, explaining the lack of reference to the material facts of the case in its unpublished opinion.

On the morning of January 2, 1997 several dozen[1] people met at the Wilson County Courthouse where they subsequently followed Wilson County Sheriff Deputy Jason Price and Wilson County Animal Control Officer Joseph Cicherski in a convoy to the small farm and home of Petitioners Alan and Lois Browns located just outside the Floresville city limits in Wilson County, Texas. Once they arrived, Price served the seizure warrant and ordered the Browns to stand back and allow access to all of the activists and media. Price then signaled for the activists to "round em up." Many of the activists began removing dogs from their pens and placing them in vehicles without any attempt by Cicherski or Price to inventory the dogs that were being removed or to otherwise determine where the animals were being placed after removal. Other activists and the various television camera crews and reporters simply roamed about the property and through the house taking videos and photographs for their own private purposes.

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1. Alan Brown testified that he was subsequently able to identify 51 separate individuals from the news footage and videos viewed after the raid, but that he was also aware of several individuals who were present that were never captured on any of the video footage.

Alan Brown testified that he immediately telephoned his daughters and son-in-laws to come help and asked them to contact Dr. Brumlow, their veterinarian, a lawyer, and even the attorney general to try to bring a halt to the raid. Fortunately, someone was able to reach Brumlow who came to the Browns' aid. When Brumlow challenged the allegations that the animals were cruelly treated, stating that the dogs had been well-cared for, with proper food, shelter, and affection, and under his regular veterinary care. Dr. Deason, another local veterinarian was contacted by Cicherski to come justify the raid. Once he arrived, Deason identified eight dogs that needed medical attention for either ear mites, fleas, tartar build-up or gingivitis and including one dog with a vaginal discharge and another favored pet who had been hand fed since birth due to a cranial birth defect,[2] although there was no evidence that any of these dogs were malnourished or cruelly treated. Following, Deason's examination, Cicherski authorized the seizure of the eight dogs and ordered all others returned to their pens.

Prior to the arrival of the veterinarians, Deputy Christopher Ayala was called to the scene to help in the execution. Upon arrival, Ayala attempted to direct some control over the activists. He testified that he found that "many of the volunteers were not attempting to load any of the dogs but were instead [] wandering about the property. At this time I ordered the people in the pens with the horses and cows to return and concentrate on the dogs that were listed on the seizure warrant. I then

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2. Without a court's authorization or consent of the Browns, this dog was euthanized by Dr. Deason following the raid.

escorted several individuals that did not comply with the order at the scene and directed them to the dog kennels." Ayala also noted that there were "several heated arguments and they were stopped by either Deputy Price or myself."

After Cicherski ordered the dogs returned to their pens, Ayala testified that "the Brown family began to state that some of their dogs were missing and that several of the dogs had been returned to the wrong pens." Ayala then advised the Browns on how to file a theft report. When a report was made for the twelve stolen animals, Ayala testified that his investigation was significantly hampered by the county's failure to identify the names of all the individuals who were allowed access to the Browns' property. Despite his efforts, he was never able to determine the names of most of the participants, and was even unable to locate many whose names were identified.

Both Price and Cicherski have testified that they were surprised by the number of people that greeted them at the courthouse that morning. With the single exception of Tracy Frank, from the Southern Animal Rescue Association, neither Cicherski or Price had personally invited any of the people to attend what was to be a seizure of the Browns' small purebred dogs and cats that were raised on their farm for sale to the public. Even Frank, who arranged for the volunteers to participate in the raid, was unable to identify the names of most of individuals present. She had contacted several activists and organizations across the state who in turn contacted many others who were unknown to her.

At no time before the arrival at the Browns' home did either Price or Cicherski manage to ascertain the identities of all the people allowed to participate in the seizure. Nor did they attempt to instruct the individuals regarding the restrictions set out in the warrant or otherwise attempt to control the actions of all the people who converged upon the Browns that morning. Rather, Mr. Brown and Officer Price have both testified, that following a signal by Price to "round them up," many of the activists began removing dogs from their pens and placing them in vehicles without any effort by Cicherski or Price to catalog the dogs that were being removed or to otherwise determine where the animals were being placed. Certainly, none of the Respondents made any attempt to inventory all of the animals that were removed from the Browns property.

While still at the courthouse prior to the raid, two individuals–Ray Massey and Pam Delabar–held themselves out as having specialized training in animal cruelty investigations and rescues and sought out the particulars regarding the warrant which Cicherski had failed to convey to the gathering. The animal activists and television and newspaper participants waited outside the courthouse while Delabar, Massey and another animal activist, William Weatherholtz, went to County Attorney Russell Wilson's office inside the courthouse. According to Delabar, she informed Wilson that the warrant was too broad as written and that she would not participate unless it was rewritten. While they waited, the warrant and affidavits were rewritten, however, Justice of Peace Emilio Flores who had signed the defective warrants was not at the Courthouse that morning. Consequently, Cicherski and

Price, proceeded on to the Browns. The warrant that was actually served on the Browns, however, had been prepared by the County Attorney and signed by J.P. Flores prior to the arrival of Delabar and Massey.

According to J.P. Flores, the warrant he issued was based on Cicherski's December 30, 1996 "bare-bones" affidaivit. He testified that in addition to the four-corners of the affidavit, he relied on unsworn verbal testimony of Cicherski and his own personal observations from three weeks earlier when he had visited the Browns' property to purchase a poodle as a present for his granddaughter. He did not like the smell of the Browns' home and was upset that the Browns were asking way too much money for the poodle. Clearly, J.P. Flores had completely abandoned his role as a neutral and detached magistrate. The evidence shows that JP Flores' probable cause determination was not based on the four corners of the affidavit.

Following the raid, but prior to a hearing before the justice court, seven of the eight dogs that were admittedly seized by the County were returned to Lois Brown and all charges of animal cruelty against her were dismissed with prejudice. Consequently, the condition of the Browns' farm and animals is not a material issue in this case. This case concerns the official process relating to the execution of a seizure warrant that was perverted by the participation of a horde of animal activists, multiple television camera crews, and a couple of newspaper reporters. The nature of the Browns' business of breeding small dogs and cats for money, however, is important in understanding the motivations behind what happened to the Browns during the early morning hours of January 2, 1997.

The initial and primary instigator of this publicized raid was a radical animal rights activist named Tracy Frank who founded the Southern Animal Rescue Association. Although at one point Cicherski testifies that he initially contacted Frank after receiving three anonymous complaints, there is reason to believe from his later testimony that two of those complaints were actually made after the January 2, 1997 raid. Furthermore, there is also reason to believe that Frank was the individual who originally instigated the single complaint that led to the raid.

Frank is a woman compelled by her passions regarding the utilization of animals for breeding purpose. According to Frank, all dogs and cats should be spayed and neutered and, consequently, she opposes, on principle, the commercial breeding of these pets. The very nature of a legal breeding enterprise is considered by Frank to be cruel. Frank is an adherent of the current trend in the animal rights movement which is attempting to redefine the relationship between people and animals. *See* LORENZ O. LUTHERER ET AL., TARGETED: THE ANATOMY OF AN ANIMAL RIGHTS ATTACK (1992) (Dr. Lutherer, a Professor in the Department of Physiology and Internal Medicine at Texas Tech Health Sciences Center, writes about the radical elements of the animal rights movement). This movement is motivated by the philosophical imperative that animals, like humans, possess certain fundamental and inalienable rights. According to Frank's own testimony, she intended to send a message to breeders across the state by orchestrating a media event to put Lois Brown out of business.

II. The Proceedings Below.

Petitioners Alan and Lois Brown originally filed suit, *pro se*, in federal district court, alleging a violation of their rights under the United States and Texas Constitutions, as well as various state law causes of actions against numerous defendants involved in an unreasonable search and intrusion on their farm. Subsequently, the Browns retained counsel and the Third Amended Complaint was filed on October 22, 1998 naming Respondents Cicherski, Ayala, Price and Tackitt, among others. *See* Appendix H.

Respondents Cicherski, Ayala, and Price moved for summary judgment claiming that they were entitled to the defense of qualified and official immunity because they relied on a valid seizure warrant. *See* Appendix J. These respondents did not address in their motions the Browns' claims regarding the manner in which the warrant was executed. The U.S. Magistrate Judge issued a memorandum and recommendation denying the motion addressing the only claim raised by these respondents in the motion. *See* Appendix D. Following objections by these respondents, United States District Judge Orlando Garcia issued an order accepting the memorandum and recommendation of the magistrate. *See* Appendix B.

Respondent Tackitt moved for summary judgment claiming he was entitled to qualified and official immunity because the Petitioners failed to establish a sufficient nexus between the sheriff's actions and the alleged constitutional deprivations at issue. *See* Appendix I. The U.S. Magistrate Judge issued a memorandum and recommendation denying summary judgment as to the

claims that the sheriff applied for the warrant at issue based on a "bare bones" affidavit and that he failed to properly train his officers regarding the use of volunteers when executing a warrant. *See* Appendix E. Following objections by respondent Tackitt, United States District Judge Orlando Garcia issued an order accepting in part and rejecting in part the memorandum and recommendation of the magistrate. *See* Appendix C. The Court dismissed the failure to train claims, and denied summary judgment on the claims regarding Tackitt's warrant application.

On interlocutory appeal, a three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the District Court's order denying the respondents Ayala, Price and Cicherski's summary judgment motion and rendered judgment in their favor on all claims including the claims not addressed by the respondents in their motions or the District Court in its order regarding the manner in which the seizure warrant was executed. The Panel dismissed the only claim actually raised by respondents regarding the validity of the warrant solely on the basis of the sufficiency of the evidence without addressing the matters of law pertaining to this issue.

Additionally, the panel reversed the District Court's order denying, in part, Tackitt's summary judgment motion to the extent that it denied the motion. Judgment was rendered in favor of Tackitt based solely on the sufficiency of the evidence.

REASONS FOR GRANTING CERTIORARI

Petitioners Alan and Lois Brown brought this lawsuit under 42 U.S.C. § 1983 to recover for the harm they suffered when the official process of their local government was corrupted and perverted by the hostile and undue outside influence of the media and animal activists, as well as the incompetence of the local officials, during the execution and planning of a seizure of their animals. The Panel's refusal to establish the constitutionality of the Browns' claims in its opinion dismissing their claims based on the defense of qualified immunity not only deprives the Browns of any meaningful due process, but it also deprives the American public of the protection afforded them when constitutional infractions become clearly established.

Also important, is the legitimate concern that if a § 1983 claimant is not provided recourse when a Circuit Court reaches out beyond its jurisdiction to dismiss claims without so much as an explanation, it deprives the entire Federal Court system of its integrity and breeds contempt from within this very system. Although the legal principles of appellate jurisdiction on interlocutory appeal are well settled, in order to insure the continued viability of a non-corrupted Federal system of justice and unbiased equity within its courtrooms, this Court must remain diligent when these well-settled principles are ignored by a Circuit Court under the cloak of an unpublished opinion.

This is especially true, as in this case, when the issues concern matters of such extreme volatility. The issues regarding the rights of animals resonate with many individuals in ways that cause them to go to extreme

measures to further their agenda. *See* 18 U.S.C. § 43 (2001) (Animal Enterprise Terrorism Act); 146 CONG. REC. 125, E1728 (2000) (reporting on the significant problem of animal rights terrorists on farmers); *see also* 102 H.R. Rep. No. 498, 102nd Cong., pt 2 (1992) (Animal Rights Terrorism Act of 1992). Certainly, this makes the question of whether officers can constitutionally invite hordes of unidentified animal rights activists on to an animal breeder's property in execution of a warrant for alleged animal cruelty an important issue of national concern.

A. The theoretical justification for the defense of qualified immunity is undermined if the Circuit Court of Appeals is allowed to dismiss claims based upon the defense without first establishing the constitutionality of the conduct in question.

The two-part test required by this Court for evaluating a claim for qualified immunity has long been well established. Accordingly, a court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (citing *Conn v. Gabbert*, 526 U.S. 286 (1999)). As this Court has explained, this "order of procedure is designed to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Wilson*, 526 U.S. at 609 (citing *Siegert* v. *Gilley*, 500 U.S. 226, 232, (1991)). By requiring a court to first decide the constitutional question before addressing the qualified immunity question, it also

promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. *Wilson*, 526 U.S. at 609 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 840-842, n. 5 (1998)).

If, however, a Circuit Court is allowed to dismiss claims based on the defense of qualified immunity without first determining the constitutionality of the conduct in question, this theoretical justification is significantly undermined at the expense of the general public. Not only does it deprive the claimant an opportunity to challenge the reasoning of the circuit court on petition for certiorari, but it also deprives the general public of the protection afforded by clearly established rights when such conduct is repeated in the future. Consequently, the question presented by this Petition regarding whether a Circuit Court can disregard well established legal principles regarding their qualified immunity analysis, has grave impact on the public at large.

The Browns are certainly entitled to have their claims addressed on the merits and under the laws of this nation rather than arbitrarily and capriciously dismissed without explanation. Before the Panel dismisses the Browns' claims under the auspice that the contours of the rights were not clearly established at the time of the raid, it has a duty to, at the very least, analyze the issues of law pertaining to the Browns' claims in light of the facts of their case to determine if the officers' violated the Constitution by their actions. At least then the Browns' anguish and tragic experiences could serve to clearly establish for future litigants that the Fourth Amendment is violated when governmental officials invite hostile third parties violently opposed to a citizen's legal business

practices onto that citizen's property and into his home to freely roam about and conduct searches and non-inventoried seizures for his own personal goals and profit.

B. The integrity of the Federal Judicial system is undermined if there is no recourse when, on interlocutory appeal, a circuit court dismisses § 1983 claims without explanation and without first being raised by respondents or addressed by the district court below when the only claim actually raised is dismissed solely on the basis of the sufficiency of the evidence

At every stage in the this litigation Petitioners have aggressively pursued their § 1983 claims regarding the manner in which the seizure warrant was executed. When respondents Cicherski, Ayala, and Price moved for summary judgment on the sole issue of reliance upon a valid warrant, Petitioners again raised the issue and brought forward competent summary judgment evidence in their response to support their claims regarding the manner in which the warrant was executed. Specifically, the Browns offered evidence that the county defendants did not ascertain the identities of the activists and media personnel that were allowed to roam freely through their home and pastures, taking videos and photographs for their private use and examining horses and cattle not covered by the warrant. Additionally, the Browns offered evidence that these unidentified people were allowed to remove the animals and place them in private vehicles without any attempt by Respondents Cicherski, Ayala, and Price to monitor and inventory the animals as they were removed. As a direct result of the officers failure to control the actions of this mob of people hostile to the

Browns' legitimate animal breeding business, valuable livestock were stolen and have never been returned.

Nevertheless, the Magistrate and District Court limited their decisions to the only issue raised by the respondents. Finding that the Browns' provided competent evidence that challenged the validity of the warrant at issue because it was supported by a "bare-bones" affidavit, the summary judgment motion was denied. *See* Appendix B and D. When respondents filed their interlocutory appeal to the Fifth Circuit on this single issue, the Browns again asserted its claims that the manner in which the warrant was executed violated their clearly established constitutional rights.

According to 28 U.S.C. § 1291 a Circuit Court lacks jurisdiction to review an order of the District Court denying summary judgment on the defenses of qualified and official immunity based on the sufficiency of the evidence. The Circuit Court's jurisdiction for an interlocutory appeal is limited to strictly matters of law. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Thibodeaux v. Harris County*, 215 F.3d 540, 540 (5th Cir. 2000). Despite the Browns' challenge to the Fifth Circuit's jurisdiction, the panel opinion dismissed their claims regarding the validity of the warrant without even addressing the matters of law pertaining to the claim. Instead, the Circuit Court erroneously asserted without actual evidentiary support that the Browns consented to the search of their property.

In order to maintain the Browns consented to the events that transpired on that ominous January morning, the Circuit Court would have to do far more than view the

evidence in the light most favorable to the officers in support of their summary judgment motion, it would also have to fabricate its existence because there is not even a mere scintilla of competent summary judgment evidence to support this finding of fact. Mr. Brown's testimony makes clear there was no consent,[3] but a finding of consent is also inconsistent with the testimony of Officer Ayala, who indicated he harbored no doubt that the Browns did not want any of the participants on their property.

Although this Court rarely grants a writ of certiorari when the asserted error consists of erroneous factual findings, *see* S.Ct.R. 10, this Court should grant this Petition because of the sheer magnitude of the Fifth Circuit's disregard for basic and fundamental issues of

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3. Alan Brown provided testimony that, "[t]here's a sheriff with a - gun there telling me to stand back and let these people do their jobs. No I didn't ask anyone to leave. . . .There was a whole bunch of people there. No. There were a lot of things I might and should have asked but I didn't. I was worried for my life and my family's life." Explaining the impact of the initial onslaught, he testified, "what was going through my mind right then was unbelievable. I didn't know what to do. And I seen all these people coming, and the deputy sheriff had a gun on and another one out there. So the only thing I could do is I thought in my mind, 'I'll go get my gun.' But then I walked around and [saw] my wife, and I figured, well, I wasn't going to take no chance of getting her killed or anything. So I got on the telephone and called my daughter and told her they're out here to steal my wife's dogs and her dogs, and would she call the Attorney General's office and call a lawyer, call up Dr. Brumlow."

law. Not only did the Court lack jurisdiction for its action, it summarily dismissed valid claims without even a simple reference to the claims in its opinion. Rather, the Fifth Circuit simply states:

> The Browns also have not shown that any clearly established rights were violated by the decision to use volunteers to help execute a warrant that authorized the seizure of over 100 animals.[4]

The banality and paucity of the Panel's decision merely serves to cloak its absolute assault on the most fundamental principles of our Constitution. The opinion effectively cremates the essential principles of American justice: that each and every American citizen is entitled to a fair and impartial hearing in its court.

1. The officers' brief to the Fifth Circuit contained highly prejudicial and inflammatory accusations regarding animal cruelty that were not relevant to the issues in this case and served only to illegitimately inflame and prejudice the Panel against the Browns

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3. In stark contrast to the Circuit Court's dereliction of judicial responsibilities, the District Court has addressed the issues of law pertaining to the Browns' complaints about the manner in which the warrant was executed in its March 31, 1999 order pertaining to the respondents' 12(b)(6) motions. This order, in relevant part, is reproduced in Appendix F of this Petition.

The officers' briefs to the Fifth Circuit were littered with inappropriate and irrelevant statements regarding "horrendous and deplorable conditions," animal cruelty and "puppy mills." Significantly, this is not an animal cruelty case. All charges of animal cruelty against the Browns were dismissed with prejudice. Certainly any statements concerning the condition of the Browns' cattle which were not subject to the seizure warrant serve no legitimate connection to the issues in this case.[5] These accusations have no legitimate purpose pertaining to the issues in this case other than to illegitimately inflame and prejudice the Fifth Circuit Panel against the Browns.

Additionally, the officers continued reference to the Browns' farm as a "puppy mill" is inappropriate. Puppy mill is a pejorative term not subject to a precise definition, however, the term elicits a person's worst image of the most deplorable conditions. Certainly, it is inappropriate to use such an emotionally charged and slanderous term to describe the Browns' small enterprise in the context of a summary judgment where the evidence must be considered

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5. Appellees' Reply Brief, at 6, states:

> Although not subject to the seizure warrant, cattle on the Browns' farm were also subject to the wrath of the Browns' ill treatment. The following day, one calf died of malnutrition and the remaining cattle were covertly moved from the premises by the Plaintiffs. Throughout this entire incident, the rights of the animals on the Browns' farm to humane treatment have remained silent in Plaintiffs' argument.

in the light most favorable to the non-movant.

C. Whether the Fourth Amendment places any restriction on the use of animal rights activists as volunteers in the execution of a seizure warrant for animals alleged to be cruelly treatment is an important issue of Federal Law

In light of the growing animal rights movement in this country and its impact on animal enterprises like the Browns' small breeding operation, the question concerning the extent the Fourth Amendment prohibits the use of these volunteers in a seizure of animals alleged to be cruelly treated is an important issue of federal law. *See* 18 U.S.C. § 43; LORENZ O. LUTHERER, TARGETED: THE ANATOMY OF AN ANIMAL RIGHTS ATTACK, xiii (1992) ("[t]errorists acts by radical elements of the animal rights movement are an intentional phenomenon .. .the activists need only to allege cruelty; it is unnecessary for them to document it."). Certainly, the contours of how volunteers may be effectively utilized is an issue that should have been addressed by the Fifth Circuit.

Conclusion

The Fifth Circuit's non-jurisdictional opinion dismissing the Browns' legitimate claims without addressing the constitutionality of the respondents conduct was a gross failure of its duty. While review of a writ of certiorari is not a matter of right, but of judicial discretion, review by a circuit court is a matter of right. Consequently, this case should be remanded to the Fifth Circuit for review of the issues in light of the well established legal principles or the Fifth Circuit's opinion

should be overturned because of a lack of jurisdiction and remanded to District Court for a trial on the merits of the Browns' claims.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed May 28, 2001]
No. 00-50893
Summary Calendar

ALAN BROWN; LOIS BROWN,
Plaintiffs-Appellees,

v.

WILSON COUNTY, Etc.; ET AL.,
Defendants

JOSEPH CICHERSKI, Wilson County Animal Control Officer in his official and individual capacity; JOE D. TACKITT, Wilson County Sheriff in his official and individual capacity; JASON PRICE, Sheriff's Deputy in his individual and official capacity; CHRISTOPHER AYALA, Sheriff's Deputy in his individual and official capacity;
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-97-CV-1473

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:[1]

Joseph Cicherski, Jason Price, and Christopher Ayala appeal the district court's denial of their motion for summary judgment based on the defenses of qualified and official immunity. Joe D. Tackitt likewise appeals the district court's judgment to the extent that it denied his motion for summary judgment based on the defenses of qualified and official immunity.

In an appeal from the denial of summary judgment, this court reviews the record de novo. *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472 (5th Cir. 1996). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmovant, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c).

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1. Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Whether a public official is qualifiedly immune depends on two inquiries. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 223 (5th Cir.), *cert. denied* 528 U.S. 1022 (1999). First, a defendant is entitled to qualified immunity when a plaintiff has failed to allege the violation of a clearly established constitutional right. *Id.* Second, a defense of qualified immunity will succeed if the defendant's conduct was objectively reasonable at the time in light of clearly established law. *Id.* Under Texas law, government officials are immune from claims arising out of (i) their discretionary duties (ii) when performed in good faith (iii) in the scope of their authority. *Cantu v. Rocha*, 77 F.3d 795, 804 (5th Cir. 1996).

The appellants' motions should have been granted based on the Browns' failure to show a violation of their clearly established constitutional rights and on the appellants' good faith. The appellants adduced evidence indicating that the Browns had consented to the search. The Browns did not produce competent summary-judgment evidence to rebut this showing. Because the search was consensual, it was valid. *See United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993).

The Browns likewise cannot show a Fourth Amendment violation with respect to the presence of the media at a search until two years after the search that is at issue in the instant case. *See Wilson v. Layne*, 526 U.S. 603 (1999). Because this right was not clearly established at the time of the search, this claim falls to the defense of qualified immunity.

The Browns also have not shown that any clearly established rights were violated by the decision to use volunteers to help execute a warrant that authorized the seizure of over 100 animals.

The Browns have likewise not shown that their clearly established rights were violated in connection with the seizure of their dogs. We have previously confronted this issue in another appeal arising from this case, *Brown v. Wilson County*, No. 99-50442, slip op. at 11 (5th Cir. May 30, 2000). In that case, we reviewed Texas law and noted its "willingness, even if conditional, to view animals as something more than personal property subject to the vicissitudes of owner's rage, abuse, or neglect." *Id.* at 11, quoting *Pine v. State*, 921 S.W.2d 866, 873 (Tex. App. 1996). We thus determined that "the law is not clearly established that an animal control officer cannot constitutionally seize all of a large number of animals if a substantial number of them are being mistreated." *Id.*

Although the opinion in the prior appeal is nonprecedential, it's analysis of the issue whether the seizure of the Browns' animals presents a violation of a clearly established constitutional rights applies with equal force to the instant case. Because it is not clear whether the seizure of the dogs violated the Browns' constitutional rights, the appellants' motions for summary judgment should have been granted with respect to the claims arising from this seizure. Our analysis of *Pine* similarly leads us to the conclusion that the appellants acted in good faith in connection with the seizure. They are entitled to assert the

state-law defense of official immunity.

The Browns have not shown any violations of their clearly established rights in connection with the search and seizure that forms the basis for this suit. They also have not shown that the appellants acted in bad faith in carrying out this search and seizure. Accordingly, the judgment of the district court denying the motion for summary judgment of Ayala, Price, and Cicherski is REVERSED. The district court's judgment regarding Tackitt's motion for summary judgment is also REVERSED to the extent that it denied Tackitt's motion. Judgment is RENDERED in favor of Tackitt, Ayala, Price and Cicherski.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS SAN ANTONIO DIVISION

[Filed August 18, 2000]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs	)
v.	)
WILSON COUNTY, et al., Defendants	)

ORDER ACCEPTING RECOMMENDATION OF MAGISTRATE JUDGE

On this date came to be considered the Memorandum and Recommendation of United States Magistrate Judge John W. Primomo (docket no. 862), and the objections of defendants Wilson County Deputies Christopher Ayala and Jason Price and Wilson County Animal Control Officer Joe Cicherski (docket no. 863).

When a party objects to a memorandum and recommendation, the Court is required to make a *de novo* determination of those portions of the report or proposed findings or recommendations to which objection is made. *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 646 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). In contrast, when there have been no objections to portions of the report, the Court reviews those poritions to determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989).

The present suit stems from a raid on the Browns' property. The Browns maintained their residence on the property and also used the property to raise dogs and cats for sale to the public. The raid was organized to execute search and seizure warrants for animals that had allegedly been cruelly treated. Taking part in the raid along with Ayala, Price, and Cicherski, were members of the print and broadcast media, a veterinarian, and individuals who have been referred to in this case as animal rights activists.

Ayala, Price, and Cicherski argue they are entitled to qualified immunity based on their good faith execution of a facially valid seizure warrant. The magistrate judge concluded, however, that the warrant was based on a "bare bones" affidavit, and therefore, their immunity claims should be denied.

Defendants argue that Cicherski, after having

received complaints of the Browns' puppy mill, conducted his own independent investigation and sought expert advice from animal rights activists, a State Health Department Veterinarian, and the County Attorney in obtaining the seizure warrant. They also argue that Deputies Ayala and Price relied in good faith on the warrant in carrying out their official duties in executing the warrant.

The Supreme Court has repeatedly found the issuance of either arrest or search warrants on conclusory or "bare bones" affidavits to be constitutionally insufficient. *See generally Illinios v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2332 (1983). Cicherski's affidavit in this case is a textbook example of a bare-bones affidavit. Cicherski states only that, "I have reason to believe and do believe that . . . LOIS BROWN did cruelly treat . . . in excess of 100 dogs . . . ." Motion for summary judgment, ex. A, Response ex. FF. Cicherski, however, gives no supporting facts and circumstances for his belief. *See United States v. Brown*, 941 F.2d 1300, 1303 n.1 (5th Cir. 1991) (per curiam) (giving as an example, an affidavit that states the affiant "has cause to suspect and does believe" that contraband is located on the premises.). Thus, any reasonably competent law enforcement officer would have concluded that the "bare bones" affidavit prepared by County Attorney Wilson, signed by Cicherski, and relied on by Justice of the Peace Flores was constitutionally inadequate. *United States v. Leon*, 468 U.S. 897, 914, 104 S.Ct. 3405, 3416 (1984). In *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092 (1986), the Supreme Court held that,

where "a reasonably well trained officer in petitioner's position would have known that his affidavit failed to establish probable cause," the officer should not have applied for the warrant. *Id.* at 345, 106 S.Ct. at 1098. That a magistrate issues a warrant in such a case does not excuse the officer. "The officer cannot excuse his own default by pointing to the greater incompetence of the magistrate." *Id.* at 346 n.9, 106 S.Ct. at 1099 n.9. The defendants are entitled to neither qualified nor official immunity.

The Court has conducted an independent review of the entire record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. The Court concludes that the Memorandum and Recommendations should be accepted.

Accordingly, it is ORDERED that defendants' objections are OVERRULED, and that the Memorandum and Recommendation is ACCEPTED pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b). It is further ORDERED that the motion for summary judgment filed by Deputies Ayala and Price, and Animal Control Officer Cicherski (docket 808) is DENIED.

SIGNED and ENTERED this 18th day of August, 2000.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

[Filed August 18, 2000]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs	)
v.	)
WILSON COUNTY, et al., Defendants	)

ORDER ACCEPTING IN PART AND REJECTING IN PART THE RECOMMENDATION OF THE MAGISTRATE JUDGE

On this date came to be considered the Memorandum and Recommendation of United States Magistrate Judge John W. Primomo (docket no. 868), and the objections of defendants Wilson County and Wilson County Sheriff Joe Tackitt (docket no. 872). When a party

objects to a memorandum and recommendation, the Court is required to make a *de novo* determination of those portions of the report or proposed findings or recommendations to which objection is made. *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 646 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). In contrast, when there have been no objections to portions of the report, the Court reviews those portions to determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989).

The present suit stems from a raid on the Browns' property. The Browns maintained their residence on the property and also used the property to raise dogs and cats for sale to the public. The raid was organized to execute search and seizure warrants for animals that had allegedly been cruelly treated. Taking part in the raid were Wilson County deputies, the Wilson County animal control officer, members of the print and broadcast media, a veterinarian, and individuals who have been referred to in this case as animal rights activists.

The magistrate judge recommended a holding that Wilson County is entitled to sovereign immunity as to plaintiffs' state-law claims. The Browns did not address this issue in their response to Wilson County's motion for summary judgment, and they have not objected to the magistrate judge's recommendation. The Court has reviewed this issue and finds that the magistrate judge's

recommendation is neither clearly erroneous or contrary to law, and it will be accepted.

Defendants Wilson County and Sheriff Tackitt object to the portions of the memorandum and recommendation denying their motion for summary judgment. The magistrate judge determined that the County's and Sheriff Tackitt's motions for summary judgment should be denied because a fact issue existed concerning whether they had failed to provide county deputies and County Animal Control Officer Cicherski with proper training in the use of volunteers in executing a seizure warrant.

In failure-to-train cases, a plaintiff can prove the existence of a municipal custom or policy of deliberate indifference to individuals' rights by showing either (1) that a municipality deliberately or consciously chose not to train its officers despite being on notice that its current training regimen had failed to prevent tortious conduct by its officers; or (2) that a single violation of federal rights constituting a "single incident exception" has occurred sufficient to prove deliberate indifference. *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000). "[P]roof of a single violent incident ordinarily is insufficient to hold a municipality liable for inadequate training." *Id.* (quoting *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998)). The single incident exception requires proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights and the need for additional or different police training. *Id.* (citing

Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 405, 117 S.Ct. 1382, 1391 (1997)).

Plaintiffs did not provide any evidence that any other search in Wilson County utilized volunteers. In fact, Sheriff Tackitt testified that this was the only incident of a volunteer-assisted search in Wilson County. The fact that plaintiffs could identify no other incident undercuts their argument that the need for training in this area was likely to result in the violation of constitutional rights. *Conner v. Travis County*, 209 F.3d 794, 797 (5th Cir. 2000). The Sheriff further testified that the deputies had received all State-required training, including search and seizure training through the peace officer academy as well as annual in-service training. Further, Cicherski was certified to perform his duties as an animal control officer. Plaintiffs submitted no evidence that any particular aspect of this training was inadequate. The Supreme Court has held that it will not "suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct [since] . . . [s]uch a claim could be made about almost any encounter resulting in injury." *City of Canton v. Harris*, 489 U.S. 378, 391, 109 S.Ct. 1197, 1206 (1989). Plaintiffs have not raised an issue for trial concerning Wilson County's or Sheriff Tackitt's failure to train.

The magistrate judge also recommended denial of the County's and Sheriff Tackitt's motions for summary judgment based on the factual dispute whether Sheriff

Tackitt had applied for the two January 2 warrants that were used to conduct the raid on the Browns' property. If Sheriff Tackitt had applied for the warrants based on Cicherski's bare-bones affidavit, or on no affidavit at all, then the Sheriff's actions amounted to deliberate indifference and were a proximate cause of the violation of the Browns' constitutional rights. *See Breaux v. City of Garland*, 205 F.3d 150, 161 (5th Cir. 2000) (a supervisor is liable under §1983 only if his conduct directly causes a constitutional violation or the supervisor was "deliberately indifferent" to a violation of the plaintiff's constitutional right). Further, because a "sheriff is without question the county's final policymaker in the area of law enforcement . . . a municipality . . . can be held accountable for the . . . unconstitutional actions of [its sheriff]. *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir. 1993). The Court agrees that the summary judgment motion should be denied with respect to plaintiffs' §1983 claims based on Sheriff Tackitt's application for the January 2 warrants.

The Court has conducted an independent review of the entire record, a *de novo* review of the matters raised by the objections, and has reviewed the applicable law. The Court concludes that the Memorandum and Recommendations should be accepted in part and rejected in part.

Accordingly, it is ORDERED that the Memorandum and Recommendation is ACCEPTED in part and REJECTED in part pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b). It is further ORDERED that the

motion for summary judgment filed by Wilson County and Sheriff Tackitt (docket no. 807) is DENIED as to claims against Sheriff Tackitt under § 1983 based on his application for the January 2 warrants, DENIED as to the claims against Wilson County under § 1983 based on Sheriff Tackitt's application for the January 2 warrants, and GRANTED in all other respects.

SIGNED and ENTERED this 18th day of August, 2000.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS SAN ANTONIO DIVISION

[Filed June 14, 1999]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs

v.

WILSON COUNTY, et al., Defendants

MEMORANDUM AND RECOMMENDATION

Before the Court is the motion for summary judgment filed by Wilson County Deputies Ayala and Price, and Wilson County Animal Control Officer Joe Cicherski. Docket no. 808. Defendants contend that they are entitled to qualified and official immunity from plaintiffs federal and state claims because all of their actions were reasonable and undertaken in good faith.

Defendants' assertions of immunity are premised on their execution of a facially valid seizure warrant. However, plaintiffs submitted evidence showing that the seizure warrant was based on a "bare bones affidavit," thus eliminating defendants assertions of good faith. Upon consideration, the undersigned will recommend that the motion for summary judgment be denied.

Background

Plaintiff sued defendants for violations of 42 U.S.C. § 1983, abuse of process, trespass, invasion of privacy, conversion, intentional infliction of emotional distress, tortious interference, civil conspiracy, defamation, malice and negligence. This suit stems from a raid on property of plaintiffs Alan and Lois Brown (the "Browns") that was organized by Wilson County officials and resulted in the seizure of over one hundred dogs and one dozen cats owned by the Browns. In this suit, the Browns allege that the disputed search and seizure of their property was illegal and was accomplished by Wilson County authorities who were acting in concert with numerous private individuals and entities. The Browns instituted this lawsuit against Wilson County and the private individuals and entities that allegedly participated in the raid on their property.

Summary Judgment

Federal Rule of Civil Procedure 56(b) provides that a defending party may at any time, move with or without

supporting affidavits for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. FED.R.CIV.P. 56(e).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 247-248, 106 S.Ct. at 2510. The dispute about a material fact is genuine it the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* All of the evidence and inferences drawn from that evidence must be viewed in the light most

favorable to the party opposing the motion for summary judgment. *Hibernia National Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993).

Qualified Immunity and Official Immunity

Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The qualified immunity determination requires a two-step analysis. First, the court must determine whether the plaintiff has stated a violation of a right secured by the Constitution. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); *Sanchez v. Swyden*, 131 F.3d 1144, 1147 (5th Cir. 1998). If the plaintiff crosses this threshold, the court next examines whether the right was clearly established at the time of the challenged conduct and whether the defendant's conduct was objectively reasonable. *Sanchez v. Swyden*, 131 F.3d at 1174-48.

Qualified immunity is immunity from suit rather than a mere defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). A plaintiff must plead specific facts that, if proved, would overcome the individual defendant's immunity defense, complaints containing conclusory allegations, absent reference to material facts, will not survive a

motion to dismiss. *Jackson v. City of Beaumont Police Department*, 959 F.2d 616, 620 (5th Cir. 1992). Bare allegations of malice do not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery. *Harlow v. Fitzgerald*, 457 U.S. at 817-18, 102 S.Ct. at 2738.

The analogous defense to state law claims against individual defendants is official immunity. The elements of that defense are (1) the performance of a discretionary function, (2) in good faith (3) within the scope of the employee's authority. *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994). The test employed under state law is essentially the same as the Section 1983 standard. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994). However, state law has no threshold requirement that a right be clearly established. *Id.* at 657. The Texas test focuses solely on the objective legal reasonableness of the officer's conduct. *Cantu v. Rocha*, 77 F.3d 795, 808-09 (5th Cir. 1996).

Discussion

The claims asserted in this case pertain to the execution of a seizure warrant on the Browns' farm on January 2, 1957. Defendants contend that their actions in executing the seizure warrant were the actions of reasonable officers and were undertaken in good faith. Defendants also contend that they are entitled to qualified immunity from the claims under 42 U.S.C. § 1983 because they executed a facially valid seizure warrant. Defendants

further contend that they are entitled to official immunity from the Browns' state law claims because they were performing their discretionary duties in good faith in the course and scope of their authority.

1. Section 1983 Claims and Qualified Immunity

Defendants' assertion of qualified immunity from the Browns' federal claims is based on the protection afforded by the good-faith exception to the Fourth Amendment exclusionary rule. The exclusionary rule is a judicially-created remedy that is intended to serve the privacy interests protected by the Fourth Amendment. *U.S. v. Payner*, 447 U.S. 727, 734, 100 S.Ct. 2439, 2445, 65 L.Ed.2d 468 (1980); *U.S. v. Mitchell*, 783 F.2d 971, 978 (10th Cir.), *cert. denied*, 479 U.S. 860, 107 S.Ct. 208, 93 L.Ed.2d 138 (1986). In *U.S. v. Leon*, the Supreme Court modified the exclusionary rule so that evidence seized under the authority of a warrant may be admissible even if the warrant is later found to be invalid, provided that the executing officers acted in good faith and with reasonable reliance on the warrant, 468 U.S. 897, 913-926, 104 S.Ct. 3405, 3415-3422, 82 L.Ed.2d 677 (1984). The *Leon* court described several scenarios in which the exclusionary rule would still be applicable, and it provided the following instruction that appears to weave all such exceptions together:

> In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only

> if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.

Leon, 468 U.S. at 926, 104 S.Ct. at 3422.

In alleging that the warrant was invalid, the Browns contend that Justice Of The Peace Emilio Flores, who was the magistrate that issued the seizure warrant at issue, was not a neutral magistrate. JP Flores testified at his deposition that he had been to the Browns' home in search of a poodle as a present for a granddaughter three weeks before he was presented with the warrant. Response, Exh. K, Flores Depo, p. 24. He also stated in his deposition that he did not like the smell of the Browns' house, and he thought the Browns were asking too much money for the poodle. *Id.* at pp. 24-25. JP Flores also testified that he relied upon unsworn verbal statements by Mr. Cicherski in signing the seizure warrant. *Id.* at p. 80, ll. 4-10; p. 83, ll. 14-18. The evidence shows that JP Flores' probable cause determination was not based on the four corners of the affidavit.

The Leon court stated that the good faith exception will not apply "in cases where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979); in such circumstances, no reasonably well trained officer should rely on the warrant." 468 U.S. at 923, 104 S.Ct. at 3421.

The *Lo-Ji Sales Inc.* case involved a warrant application that requested the magistrate to accompany the police in the execution of the warrant to determine if the store to be searched was in possession of obscene material that was different from the two samples provided along with the warrant application. 442 U.S. at 321, 99 S.Ct. at 2322. The magistrate agreed, and as a result, there were no items listed or described after the warrant's recital authorizing the seizure of specific items. *Id.*, at 321-22, 99 S.Ct. at 2322. Once in the store, the magistrate conducted a generalized search, and when he ordered an item seized because he believed it to be obscene, he instructed the police to seize all similar items. *Id.*, at 327, 99 S.Ct. at 2325. Thus, the magistrate left the determination of what was "similar" to the officer's discretion. *Id.*, at 327, 99 S.Ct. at 2324-25. The court determined that the magistrate wholly abandoned whatever neutral posture he had by allowing himself to become "a member, if not the leader, of the search party which was essentially a police operation." *Id.*, at 327, 99 S.Ct. at 2324.

The faces of our case are distinguishable from *Lo-Jo Sales, Inc.* In our case, the warrant issued by JP Flores was not a warrant that failed to describe what was to be seized. Additionally, JP Flores did not become a member or leader of the law enforcement team that raided the Browns' property. However, he did not act as a neutral magistrate to the extent he relied upon his personal observations and experience as a basis for issuing the warrant.

Although the evidence suggests that JP Flores was not neutral, such evidence is not dispositive of whether the defendants acted in good faith. In addressing the "absence of a neutral and detached magistrate" exception to *Leon*'s good faith, the Fifth Circuit stated that "[t]he circumstances showing the magistrate has 'wholly abandoned his judicial role' must have been known by (or, at least reasonably knowable by) the police." *U.S. v. Breckenridge*, 782 F.2d 1317, 1321 n.2 (5th Cir.), *cert. denied*, 479 U.S. 837, 107 S.Ct. 136, 93 L.Ed.2d 79 (1986) (citation omitted). The evidence cited by the Browns does not suggest that any of the officers had knowledge of either JP Flores' visit to the Browns' residence or JP Flores' reliance upon his visit as a basis for finding probable cause. Therefore, the evidence that suggests that JP Flores was not neutral does not preclude a finding that the defendants acted in good faith in applying for and executing the warrant.

Since the evidence fails to show that JP Flores wholly abandoned his neutral role, the Browns must show that the defendants were dishonest or reckless in preparing their affidavit or that they could not have harbored an objectively reasonable belief in the existence of probable cause. The Browns contend that their rights were violated through the use of "questionable warrants obtained through mysterious and dubious methods." The Browns' response include copies of various warrants that were allegedly used during the raid on the Browns' property. However the Browns point out that JP Flores testified that

the only documents given to him by Mr. Cicherski on the morning of the raid are the documents in Exhibit FF of the response. Response. Exh. K, Flores Depo., pp. 39-41; Exh. FF. That exhibit includes an application for a seizure warrant signed by Wilson County Sheriff Joe Tackitt and an affidavit signed by Mr. Cicherski. Response, Exh. FF. The defendants contend that the claims in this case are based on a single seizure warrant issued by JP Flores. The defendants provided a copy of a seizure warrant, the warrant application and affidavit. The affidavit in support of the warrant is the same as the affidavit in Exhibit FF of the Browns' response. Mot. S/J, Exh. A. Therefore, the evidence shows that the warrant and supporting documents provided by the defendants are the documents provided by Mr. Cicherski to JP Flores for his signature.

The Browns contend that Mr. Cicherski's affidavit is facially insufficient to establish probable cause for the reason that it is not based on Mr. Cicherski's personal knowledge. One sentence of Mr. Cicherski's affidavit identifies himself as the Wilson County Animal Control Officer, while the only other sentence sworn to by Mr. Cicherski makes all the factual allegations in the affidavit:

> I have reason to believe and do believe that on or about December 26, 1996, LOIS BROWN did cruelly treat one or more animal(s), to wit, in excess of 100 dogs, of all ages and sexes, of breeds approximately corresponding to AKC poodles, Pomeranians, Malteses, Yorkshire Terriers,

> and others, at RR 3. BOX 18, Floresville, on FM 536, in the County of Wilson, by depriving them of food, care or shelter, and/or cruelly confining them, the animal(s) described above.

Mot. S/J, Exh. A, Affidavit In Support Of Seizure Of Cruelly Treated Animal. The defendants contend that the Seizure warrant was facially valid, noting that it was signed by JP Flores. However, the defendants do not address the issue of whether the paucity of Mr. Cicherski's affidavit precludes any reasonable reliance upon the warrant.

The Fifth Circuit, in *U.S. v. Satterwhite*, addressed the good-faith exception and the reasonableness of the officer's reliance upon a warrant issued by a magistrate. 980 F.2d 317 (5th Cir.1992) . The *Satterwhite* court noted that "[w]hen a warrant is supported by more than a 'bare bones' affidavit, officers may rely in good faith on the warrant's validity." *Satterwhite*, 980 F.2d at 321. The court also noted that "'bare bones' affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." *Satterwhite*, 980 F.2d at 321. The *Satterwhite* court cited to *U.S. v. Brown*, which gave as an example of a bare bones affidavit, an affidavit that stated that the affiant "has cause to suspect and, does believe" that contraband is located on the premises. 941 F.2d 1300, 1303 n.1 (5th Cir.), *cert. denied*, 502 U.S. 1008, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991). Mr.

Cicherski's affidavit states that he believes that Ms. Brown cruelly treated animal, on December 26, 1996. Mr. Cicherski's affidavit is a "bare bones" affidavit because it lacks supporting facts and circumstances showing the basis for his belief. Therefore, the Court finds that the defendants Ayala, Price and Cicherski had no objectively reasonable basis to rely upon the seizure warrant issued by JP Flores.

Although the evidence presented by both parties fails to clearly indicate whether both Ayala and Price saw Mr. Cicherski's affidavit, Ayala and Price still cannot rely on the warrant. The *Leon* court cautioned that the term "officer" should not be read too narrowly:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officer. who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.

Leon, 468 U.S. at 923 n.24, 104 S.Ct. at 3420 n.24. The evidence shows that Mr. Cicherski submitted to JP Flores the bare bones affidavit, which was used to obtain the

seizure warrant at issue. Response, Exh. K, Flores Depo., pp. 39-41; Exh. FF. Therefore, based on the finding that the warrant was based on a bare bones affidavit by Mr. Cicherski, the defendants' entry-upon the Browns' land and seizure of their animals was done without good faith reliance upon the warrant.

Defendants contend that they are entitled to qualified immunity because they acted upon a facially valid warrant. Qualified immunity, which is based on an objective standard, offers no protection against a claim that is also based on an objective standard. The *Leon* court noted that the "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23, 104 S.Ct. at 3420 n.23. A recent Supreme Court case discussing qualified immunity reiterated the well-settled principle that such immunity is based on objective reasonableness. The court in *Wilson v. Layne* noted that the determination of "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the *'objective legal reasonableness' of the action*, assessed in light of the legal rules that were 'clearly established' at the time it was taken." ___ S.Ct. ___, 1999 WL 320817, *7 (emphasis added). There is no dispute that the clearly established law at the time of the raid prohibited the execution of a warrant by law enforcement officers if the officers did not have a good faith belief in the validity of the warrant. Thus, the determination of the

qualified immunity issue is based on the same standard for determining whether the defendants had good faith reliance upon the warrant.

Since the Court found that the defendants had no objectively reasonable basis to rely upon the seizure warrant issued by JP Flores, the defendants are not entitled to qualified immunity from the federal claims asserted by the Browns.

2. State Law Claims and Official Immunity

Defendants contend that the Browns' state law claims fail as a matter of law because the defendants were performing their discretionary duties in good faith in the course and scope of their authority, thus entitling them to official immunity. Official immunity hinges on whether the official's activities were undertaken in "good faith," that is, whether any reasonably prudent official could have believed that the conduct was consistent with the plaintiff's rights. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994); *Cantu v. Rocha*, 77 F.3d 795, 808-09 (5th Cir.1996). As discussed earlier in regard to qualified immunity, the court found that the defendants had no objectively reasonable basis to rely upon the seizure warrant to enter the Browns' land and seize their animals. Since the Browns' state law claims are based on the defendants' entry upon the Browns' land and the seizure of their animals pursuant to a facially invalid warrant, the defendants are not entitled to official immunity as to the state law claims asserted against them.

RECOMMENDATION

It is, therefore, the recommendation of the Magistrate Judge that the motion for summary judgment filed by Deputies Ayala and Price, and Animal Control Officer Cicherski, be DENIED.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. section 636(b) (1) and Rule 72(b), FED.R.CIV.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court.

See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglas v. United States Automobile Association*, 79 F.3d 1413, 1428 (5th Cir. 1996).

SIGNED this 14th day of June, 1999.

/s/_____
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS SAN ANTONIO DIVISION

[Filed August 20, 1999]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs	)
v.	)
WILSON COUNTY, et al., Defendants	)

MEMORANDUM AND RECOMMENDATION

Before the Court is the motion for summary judgment filed by Wilson County and Wilson County Sheriff Joe Tackitt. Docket no. 807. Wilson County contends that plaintiffs have failed to identify a policy or custom which would make the county liable, and that the county is protected against the state claims by sovereign immunity. Sheriff Tackitt asserts that there is no

connection between his actions or inactions and the alleged constitutional deprivation. As to the state law claims, Sheriff Tackitt asserts that he is entitled to official immunity. Upon consideration, the undersigned will recommend that the motion for Summary judgment be granted as to the state law claims against Wilson County and denied in all other respects.

Background

Plaintiff sued defendants for violations of 42 U.S.C. § 1983, abuse of process, trespass, invasion of privacy, conversion, intentional infliction of emotional distress, tortious interference, civil conspiracy, defamation, malice and negligence. This suit stems from a raid on property of plaintiffs Alan and Lois Brown (the "Browns") that was organized by Wilson County officials and resulted in the seizure of over one hundred dogs and one dozen cats owned by the Browns. In this suit, the Browns allege that the disputed search and seizure of their property was illegal and was accomplished by Wilson County authorities who were acting in concert with numerous private individuals and entities. The Browns instituted this lawsuit against Wilson County and the private individuals and entities that allegedly participated in the raid on their property.

Summary Judgment

Federal Rule of Civil Procedure 56(b) provides that a defending party may at any time, move with or without

supporting affidavits for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The party opposing a motion must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. FED.R.CIV.P. 56(e).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson*, 477 U.S. at 247-248, 106 S.Ct. at 2510. The dispute about a material fact is genuine it the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* All of the evidence and inferences drawn from that evidence must be viewed in the light most

favorable to the party opposing the motion for summary judgment. *Hibernia National Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993).

Qualified Immunity and Official Immunity

Government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The qualified immunity determination requires a two-step analysis. First, the court must determine whether the plaintiff has stated a violation of a right secured by the Constitution. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991); *Sanchez v. Swyden*, 131 F.3d 1144, 1147 (5th Cir. 1998). If the plaintiff crosses this threshold, the court next examines whether the right was clearly established at the time of the challenged conduct and whether the defendant's conduct was objectively reasonable. *Sanchez v. Swyden*, 131 F.3d at 1174-48.

Qualified immunity is immunity from suit rather than a mere defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985). A plaintiff must plead specific facts that, if proved, would overcome the individual defendant's immunity defense, complaints containing conclusory allegations, absent reference to material facts, will not survive a

motion to dismiss. *Jackson v. City of Beaumont Police Department*, 959 F.2d 616, 620 (5th Cir. 1992). Bare allegations of malice do not suffice to subject government officials either to the costs of trial or the burdens of broad-reaching discovery. *Harlow v. Fitzgerald*, 457 U.S. at 817-18, 102 S.Ct. at 2738.

The analogous defense to state law claims against individual defendants is official immunity. The elements of that defense are (1) the performance of a discretionary function, (2) in good faith (3) within the scope of the employee's authority. *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994). The test employed under state law is essentially the same as the Section 1983 standard. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994). However, state law has no threshold requirement that a right be clearly established. *Id.* at 657. The Texas test focuses solely on the objective legal reasonableness of the officer's conduct. *Cantu v. Rocha*, 77 F.3d 795, 808-09 (5th Cir. 1996).

Discussion

1. Wilson County

A. Claims under 42 U.S.C. § 1983

To prevail on a claim under 42 U.S.C. § 1983, the plaintiff must prove that a person, acting under the color of state law or custom, subjected or caused to be subjected any person within the jurisdiction of the United States to

the deprivation of rights secured by the Constitution. 42 U.S.C. § 1983. The Supreme Court has ruled that local government units are "to be included among those persons to whom § 1983 applies." *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978).

Counties can be subject to liability under § 1983 for adopting or failing to adopt a policy, either of which causes a deprivation of constitutional rights. When a policy is at issue, liability is imposed only if actions taken in furtherance of the policy cause the constitutional violation. *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036. Accordingly, a county cannot be vicariously liable under § 1953. *Id.*

When the failure to adopt a policy is at issue, liability can be imposed only if the omission amounts to "an intentional choice, not merely an unintentional negligent oversight." *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir.1992) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 387, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989)). The County's failure to adopt a policy does not amount to such an intentional choice unless that failure was deliberately indifferent to the rights of its inhabitants. *Id.* The Fifth Circuit has held that "[a] failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights." *Rhyne*, 973 F.2d at 392 (citing *City of Canton*, 489 U.S. at 390, 109 S.Ct. at 1205).

The Supreme Court explained in *Bd. Of The Cty. Comm. of Bryan Cty., Ok. v. Brown* how the issues of deliberate indifference and causation may be satisfied even if the county did not have notice of a pattern of conduct:

> In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tool, to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizen's rights could justify a finding that policymakers decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice–namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation–that the municipality's indifference led directly to the very consequence that was so predictable.

520 U.S. 397, 409-410, 117 S.Ct. 1382, 1391, 137 L.Ed.2d 626 (1997). Therefore, where there is no showing that Wilson County had notice of a pattern of conduct that results in the deprivation of rights, the Browns must show that a violation of constitutional rights was a highly predictable consequence of Wilson County's failure to train its officers as to how to execute a seizure warrant involving the use of volunteers and the presence of the media during the execution of the warrant.

In this case, the Browns contend that Wilson County, through Sheriff Tackitt, its policymaker for the Wilson County Sheriff's Department, failed to provide its officers with any policies or guidelines regarding how to execute a seizure warrant involving the use of volunteers and media. The Browns also contend that Wilson County failed to provide Wilson County Animal Control Officer Joseph Cicherski with any policies or guidelines regarding how to execute a seizure warrant involving the use of volunteers and media. The Browns further contend that Wilson County failed to provide training to Cicherski and the Deputy Sheriffs that conducted the raid so that they would have been able to execute a seizure warrant without violating the rights of the person whose property was being seized. The Court considers such claims to be failure-to-train claims.

In our case, the evidence shows that Sheriff Tackitt did not have policies or guidelines regarding how to execute a seizure warrant involving the use of volunteers and the presence of the media during the execution of the

warrant. Response, Exh. I, Tackitt Depo., pp. 24-27. The evidence also shows that Wilson County did not provide Animal Control Officer Cicherski any such policies or guidelines because his training was "on-the-job training." Response, Exh. C, Cicherski Depo., p. 128. Also, Mr. Cicherski answered directly to Wilson County Judge Martha Schnabel if anything he did directly affected Wilson County. *Id.* at p. 25. There is no evidence of prior incidents that would have placed Wilson County on notice that its training program was insufficient to prevent tortious conduct of the type at issue in this case. The Court notes that the Supreme Court found in *Wilson v. Layne*, an opinion issued after the raid on the Browns' property, that the law pertaining to media ride-alongs was not clearly established. ___ U.S. ___, 119 S.Ct. 1692. 1700 (1999). Therefore, the Court cannot find that a violation of federal rights was a highly predictable consequence of Wilson County's failure to provide policies or guidelines regarding the execution of a seizure warrant involving a media ride-along. Accordingly, the failure to provide such training cannot establish a claim against Wilson County.

In contrast to the law pertaining to media ride-alongs, at the time of the execution of the warrants in January 1997 the law was clearly established pertaining to the use of volunteers during the execution of a warrant. As noted by the District Court, inviting persons to participate in a search and seizure who are not named in the warrant or mentioned in the supporting affidavit is unreasonable unless their presence is reasonably necessary to accomplish the purposes of the search. *Swate v. Taylor*, 12

F.Supp.2d 591, 595 (S.D.Tex.1998). Texas law permits an officer to obtain assistance in the execution of a warrant from citizens "bound to aid in the execution of the same." TEX. CODE CRIM. PROC. Ann. art. 18.08 (Vernon 1977). To come within the scope of the statute, therefore, a person who is not authorized by the warrant to search must be there to aid the authorized officer in the execution of the warrant. That is, the third person's participation muse be designed to advance the specific purpose that justified the intrusion in the first place. Otherwise, they are not "bound to aid in the execution of the [warrant]."

The Court considers the need to use the assistance of third parties to be a recurring situation, albeit on a sporadic basis. Therefore, considering the narrow circumstances under which the use of third parties is permissible, the Court finds that a violation of federal rights was a highly predictable consequence of Wilson County's failure to provide policies or guidelines regarding the execution a seizure warrant involving the use of volunteers. Therefore, the motion for summary judgment should be denied as to Wilson County as to the claim based on the failure to train regarding the use of volunteers during the execution of a warrant.

The Browns also contend that Wilson County caused the violation of their rights due to the actions of authorized policymakers. As mentioned above, Sheriff Tackitt did not have policies regarding the use of volunteers and the presence of the media during the execution of a warrant, and Mr. Cicherski answered

directly to County Judge Martha Schnabel if anything he did directly affected Wilson County. Thus, the Browns assert that Sheriff Tackitt and County Judge Martha Schnabel acted in the capacity as policymakers.

A governmental entity may appropriately be sued under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, 2038. The Supreme Court has made, for the purpose of determining whose actions may subject the governmental entity to liability, the distinction between municipal officers that have final policymaking authority and those with only decision making authority. *See Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). "[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability." *Praprotnik*, 483 U.S. at 123, 108 S.Ct. at 924 (1988) (citing *Pembaur*, supra). "[W]hether a particular official has 'final policy making authority' is a question of state law." *Id.* And, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business." *Praprotnik*, 465 U.S. at 123, 108 S.Ct. at 924 (1968) (emphasis original). The determination of whether an official's decisions represent the official policy of the local governmental unit

is a legal question to be resolved by the trial judge before the case is submitted to the jury. *Jett v. Dallas I.S.D.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989).

Final policy-makers are usually empowered by the state to define objectives and choose the means of achieving them without supervision by any other governmental official. *See Colle v. Brazos County*, 991 F.2d 237, 244 (5th Cir. 1993); *Turner v. Upton County*, 915 F.2d 133, 126 (5th Cir. 1990). It is well settled that in Texas, the county sheriff is the county's final policymaker in the area of law enforcement. *Colle*, 981 F.2d at 244 & n.35. In regard to Texas county judges, the Fifth Circuit found in *Families Unidas v. Briscoe* that the county judge of a Texas county possesses policymaking authority in some matters. 619 F.2d 391, 404 (5th Cir.1980) . As the *Briscoe* court noted, the Texas constitution and statutes assign to the county judge numerous executive, legislative and administrative duties in the day-to-day governance of the county. *Briscoe*, 619 F.2d at 404. Due to the structure of county government in Texas, the county judge "holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the voters for his conduct therein." *Id.* The *Briscoe* court concluded that, "at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held

responsible under section 1983." *Briscoe*, 619 F.2d at 404 (citations omitted).

In regard to the raid on the Browns' property, the Browns have presented evidence showing that it is unclear as to whether Sheriff Tackitt submitted an application for the two January 2 warrants that were used for the raid that was conducted in a manner that violated the Browns' constitutional rights. Sheriff Tackitt testified that he signed his application for a warrant on December 30, 1996. Response, Exh. I, Tackitt Depo., pp. 35-37. However, two other county employees contradict Sheriff Tackitt's testimony. Justice of the Peace Emilio Flores, who signed the two January 2 warrants, testified that he got Sheriff Tackitt to sign his application in the midst of Sheriff Tackitt's swearing-in ceremony at the Wilson County Courthouse at 9:30 a.m. on January 2, 1997. Response, Exh. K, Flores, Depo., pp. 16-18. Wilson County Attorney Russell Wilson testified that he had Sheriff Tackitt sign the application for the warrant either on December 30 or on the morning of January 2. Response, Exh. J, Wilson Depo., pp. 38-39. The factual dispute as to whether Sheriff Tackitt applied for the two January 2 warrants that were used to conduct the raid on the Browns' property is an adequate basis for denying the motion for summary judgment as to Wilson County in regard to the claims under 42 U.S.C. § 1983.

In regard to County Judge Schnabel, the evidence shows that Mr. Cicherski contacted County Judge Schnabel and she directed him to obtain and execute the

warrants at issue. Response, Exh. C, Cicherski Depo., pp. 142, 143, 164, 167, 168, 186. Based on the direction Mr. Cicherski received from County Judge Schnabel, he executed the warrants with the assistance of Deputy Sheriffs. Based on this evidence, the Court finds that the actions of County Judge Schnabel may fairly be said to represent official policy for which of Wilson County may be held responsible under 42 U.S.C. § 1983. Therefore, this provides an additional basis to deny the motion for summary judgment as to Wilson County in regard to the claims under 42 U.S.C. § 1983.

B. State Law Claims

Wilson County asserts that it is entitled to sovereign immunity as to the state law claims, and the Browns do not address this issue in their response. In Texas, governmental entities, such as counties, are protected from tort suits by sovereign immunity unless that immunity has been waived by statute. *Garcia v. Maverick County*, 850 S.W.2d 626, 628 (Tex.App-San Antonio 1993, writ denied). While the Texas Tort Claims Act provides a limited waiver of sovereign immunity, it does not apply to intentional tort claims. Texas Civil Practices and Remedies Code, Section 101.057. Therefore, the motion for summary judgment should be granted as to the state law claims asserted against Wilson County.

2. Sheriff Joe Tackitt

A. Claims under 42 U.S.C. § 1983

Sheriff Tackitt seeks summary judgment as to the claims under § 1983 against him in his individual capacity on the basis chat the Browns failed to establish a sufficient nexus between his conduct and the alleged violation of the Browns' rights. The Browns contend that Sheriff Tackitt is liable under § 1983 for his application for the warrants that were used to conduct the raid at issue. The Browns also contend that Sheriff Tackitt has supervisor liability as a result of his failure to train his deputies as to the use of volunteers and the media during the execution of a seizure warrant.

Although supervisory officials may not be held liable on the basis of vicarious liability, they may be found liable when their own actions or inactions amount to deliberate indifference and are a proximate cause of the constitutional violation. *Bowen v. Watkins*, 669 F.2d 979, 988 (5th Cir.1982). The only evidence presented as to the actions of Sheriff Tackitt is evidence of his application for a warrant to seize cruelly treated animals. Response, Exh. BB. The Browns have presented evidence showing that it is unclear as to whether Sheriff Tackitt submitted an application for the two January 2 warrants for the raid that was conducted in a manner that violated the Browns' constitutional rights. In his ruling on the motion to dismiss, Judge Garcia found that Sheriff Tackitt's application for the December 30 warrant will not support a claim against him because the December 30 warrant was not used in the search. Docket no. 845, p.9. Judge Garcia also found chat the allegations in the third amended

complaint allege that the January 2 warrants were either based on the bare bones December 30 affidavit from Cicherski or they were issued without supporting affidavit. Docket no. 845, p.9

In regard to Mr. Cicherski's December 30 affidavit, the evidence show that it is a bare bones affidavit. One sentence of Mr. Cicherski's affidavit identifies himself as the Wilson County Animal Control Officer, while the only other sentence sworn to by Mr. Cicherski makes all the factual allegations in the affidavit:

> I have reason to believe and do believe that on or about December 26, 1996, LOIS BROWN did cruelly treat one or more animal(s), to wit, in excess of 100 dogs, of all ages and sexes, of breeds approximately corresponding to AKC poodles, Pomeranians, Malteses, Yorkshire Terriers, and others, at RR 3, BOX 18, Floresville, on FM 536, in the County of Wilson, by depriving them of food, care or shelter, and/or cruelly confining them, the animal(s) described above.

Mot. S/J, Exh. A, Affidavit In Support Of Seizure Of Cruelly Treated Animal. The Fifth Circuit, in *U.S. v. Satterwhite*, addressed the good-faith exception and the reasonableness of an officer's reliance upon a warrant issued by a magistrate. 980 F.2d 317 (5th Cir. 1992). The *Satterwhite* court noted that "[w]hen a warrant is

supported by more than a bare bones' affidavit, officers may rely in good faith on the warrant's validity." *Satterwhite*, 980 F.2d at 321. The court also noted that "'[b]are bones' affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause." *Satterwhite*, 980 F.2d at 321. The *Satterwhite* court cited to *U.S. v. Brown*, which gave as an example of a bare bones affidavit, an affidavit that stated that the affiant "has cause to suspect and does believe that contraband is located on the premises. 941 F.2d 1300, 1303 n.1 (5th Cir.) *cert. denied*, 502 U.S. 1008, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991). Mr. Cicherski's affidavit simply states that he believes that Ms. Brown cruelly treated animals on December 26, 1996. The Court finds that Mr. Cicherski's affidavit is a "bare bones" affidavit because it lacks supporting facts and circumstances showing the basis for his belief. Thus, if Sheriff Tackitt based his warrant application on Mr. Cicherski's December 26 affidavit or no affidavit at all to obtain the January 2 warrants, then a jury may have an adequate basis for finding that Sheriff Tackitt's actions amounted to deliberate indifference and were a proximate cause of the Browns' injury.

A recent Supreme Court case discussing qualified immunity reiterated the well-settled principle that such immunity is based on objective reasonableness. The court in *Wilson v. Layne* noted that the determination of "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official

action generally turns on the *'objective legal reasonableness'* of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." 119 S.Ct. at 1699 (emphasis added). There is no dispute that the clearly established law at the time of the raid prohibited the use of a bare bones affidavit, or no affidavit at all, in conjunction with a warrant application. Clearly, the use of a bare bones affidavit, or no affidavit at all, in conjunction with a warrant application would be unreasonable. Therefore, as a result of the factual dispute as to whether Sheriff Tackitt applied for the two January 2 warrants, the motion for summary judgment should be denied as to the claims against Sheriff Tackitt under § 1983 that are based on his application for the January 2 warrants.

The Browns also seek to impose liability against Sheriff Tackitt on the basis that he failed to properly train his deputies that executed the warrants at issue. In that regard, the Browns must show that: (1) Sheriff Tackitt failed to train the officers, (2) a causal connection existed between the failure to supervise or train and the violation of the Browns' rights; and (3) such failure to train amounted to deliberate indifference. *Baker v. Putal*, 75 F.3d 150, 199 (5th Cir.1996). The deliberate indifference standard is the same for claims asserting municipal liability and supervisor liability. *Id.* Thus, a high degree of predictability that an officer's lack of certain training would violate citizens' rights, will (1) support a finding that the decision not to train reflected deliberate indifference, and (2) provide an inference of causation.

Brown, 520 U.S. at 409-410, 117 S.Ct. at 1391. As noted earlier, the evidence shows that Sheriff Tackitt did not have policies or guidelines regarding the use of volunteers during the execution of a seizure warrant. Response, Exh. I, Tackitt Depo., pp. 24-27. As noted in the analysis pertaining to the claim of county liability, the law pertaining to the use of volunteers during the execution of a warrant was well settled long before the incident in question. Also, the Court considers the need to use the assistance of third parties to be a recurring situation, albeit on a sporadic basis. Therefore, as found in regard to the claim of municipal liability, the Court finds that Sheriff Tackitt's failure to train regarding the use of volunteers made it highly predictable that his deputies would violate citizens' rights when using volunteers during the execution of a seizure warrant.

Since Sheriff Tackitt's failure to train violated the Browns' constitutional rights, the Court must consider the objective legal reasonableness of such action in light of the legal rules that were clearly established at the time of such action. For our purposes, Sheriff Tackitt's "action" is considered to be his decision to not provide training regarding the use of volunteers during the execution of a seizure warrant. Considering the narrow circumstances under which the use of third parties is permissible, and the likelihood that an officer facing a situation requiring the assistance of third parties will violate citizens' rights, the Court finds that Sheriff Tackitt's decision not to train his officers as to the use of volunteers during the execution of a warrant was objectively unreasonable. As a result,

Sheriff Tackitt is not entitled to qualified immunity in regard to the failure to train regarding the use of volunteers. Therefore, the motion for summary judgment should be denied as to the claims against Sheriff Tackitt based on his failure to train his officers regarding the use of volunteers during the execution of a warrant.

B. State Law Claims and Official Immunity

Sheriff Tackitt contends that the Browns' state law claims fail as a matter of law because he is entitled to official immunity. Official immunity hinges on whether the official's activities were undertaken in "good faith," that is, whether any reasonably prudent official could have believed that the conduct was consistent with the plaintiff's rights. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex.1994); *Cantu v. Rocha*, 77 F.3d 795, 808-09 (5th Cir.1996). As discussed earlier in regard to qualified immunity, the Court finds that Sheriff Tackitt had no objectively reasonable basis to make a warrant application based on a bare bones affidavit or no affidavit at all. Since the Browns' state law claims are based on the defendants' entry upon the Browns' land and the seizure of their animals pursuant to a facially invalid warrant, Sheriff Tackitt is not entitled to official immunity as to the state law claims asserted against him.

RECOMMENDATION

It is, therefore, the recommendation of the Magistrate Judge that the motion for summary judgment

filed by Wilson County and Wilson County Sheriff Joe Tackitt be (1) DENIED as to Wilson County as to the claim based on the failure to train regarding the use of volunteers during the execution of a warrant; (2) DENIED as to the claims against Sheriff Tackitt under § 1983 and state law that are based on his application for the January 2 warrants; (3) DENIED as to the claims against Sheriff Tackitt based on his failure to train his officers regarding the use of volunteers during the execution of a warrant; and (4) GRANTED in all other respects.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. section 636(b) (1) and Rule 72(b), FED.R.CIV.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.*** A party's failure to file written

objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 472, 88 L.Ed.2d 435 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglas v. United States Automobile Association*, 79 F.3d 1413, 1428 (5th Cir. 1996).

SIGNED this 19th day of August, 1999.

/s/_____
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS SAN ANTONIO DIVISION

[Filed March 31, 1999]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN,
Plaintiffs

v.

WILSON COUNTY, et al.,
Defendants

ORDER ACCEPTING IN PART AND REJECTING IN PART RECOMMENDATIONS OF MAGISTRATE JUDGE

On this date came on to be considered ten Memoranda and Recommendations ("recommendations") of United States Magistrate Judge John W. Primomo and the objections to the recommendations. The recommendations all concern FED.R.CIV.P. 12(b)(6)

motions to dismiss filed by various defendants.[1]

Plaintiffs, Alan Brown and Lois Brown, have objected to the recommendations that defendants' motions to dismiss be granted. When a party objects to a memorandum and recommendation, the Court is required to make a *de novo* determination of those portions of the report or proposed findings or recommendations to which objection is made, *Kreimerman v. Casa Veerkamp*, 22 F.3d 634, 646 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994); 28 U.S.C. § 636(b)(1)(C); FED.R.CIV.P. 72(b). When, on the other hand, no one has objected to the magistrate judge's recommendations, the Court need not conduct a *de novo* review of the entire record. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). In such cases, the Court need only review the recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), *cert. denied*, 492 U.S. 918 (1989).

The Court has conducted an independent review of the record, a de novo review of the matters raised by the objections, and has reviewed the applicable law. In cases

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1.The memoranda and recommendations (M&R), the corresponding motions to dismiss, and objections, by docket number, and the defendants who filed the motions to dismiss are: [not reproduced in appendix].

where no objections were lodged, the Court has reviewed the recommendation to determine whether it is clearly erroneous or contrary to law.

Motions to dismiss for failure to state a claim are viewed with disfavor, and a court will only rarely encounter circumstances that justify granting such a motion. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997); *Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 926 (5th Cir. 1988). The Court will accept the well-pleaded allegations in the compliant as true, construe those allegations in the light most favorable to the plaintiffs, and draw all inferences in their favor. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994). The facts discussed in this order will be as alleged by the Browns in their Third Amended Complaint (Doc. 656) in light of the standard mandated by Rule 12(b)(6). A claim will not be dismissed on a 12(b)(6) motion unless it appears to a certainty (1) that no relief can be granted under any set of facts provable in support of its allegations, or (2) that the allegations, accepted as true, do not present a claim upon which relief legally can be obtained. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 735 (5th Cir. 1988).

Many of the Browns' claims apply to several defendants and cut across several recommendations. Rather than taking the recommendations one by one, it will be easier to group the defendants and the claims

against them. The easiest way to do this is to organize the defendants into three groups: the official defendants, the individual defendants, and the media defendants.

I. Official Defendants

The official defendants are Wilson County Attorney Russell Wilson, former Wilson County Animal Control Officer Joseph Cicherski, Wilson County Sheriff Joe D. Tackitt, Deputy Sheriff Jason Price, Deputy Sheriff Christopher Ayala, and Dr. Catherine Tull, a licensed veterinarian and Texas Department of Health Officer.

All official defendants were sued in their individual capacities, and all except for Dr. Tull were sued in their official capacities. Since Wilson County remains a defendant in this case, the magistrate judge recommended that all official-capacity claims against these defendants be dismissed. Those recommendations are unobjected to and will be ACCEPTED. The magistrate judge also concluded that Wilson is not entitled to prosecutorial immunity. The Court agrees and will ACCEPT that recommendation.

A. Individual-capacity claims.

The official defendants assert that the Browns' individual-capacity claims under § 1983 and state-law claims are barred by qualified immunity and official immunity, respectively. Qualified immunity shields certain public officials performing discretionary functions from civil damage liability if their actions could reasonably

have been thought consistent with the rights they are alleged to have violated. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). In *Siegert v. Gilley*, 500 U.S. 226, 232-33, 111 S.Ct. 1789, 1793-94 (1991), the Supreme Court established a two-step analysis for qualified immunity cases. The first question is whether the plaintiff alleged the violation of a clearly-established constitutional right under currently applicable law. *Petta v. Rivera*, 143 F.3d 895, 899 (5th Cir. 1998); *Rankin v. Klevenhagen*, 5 F.3d 103, 106 (5th Cir. 1993). If the plaintiff clears this hurdle, the court then determines whether the defendant's conduct was objectively reasonable in light of clearly established law as it existed at the time of the conduct in question. *Petta*, 143 F.3d at 899-900; *Rankin*, 5 F.3d at 105. "Even if a defendant's conduct actually violates a plaintiffs constitutional right, the defendant is entitled to qualified immunity if the conduct was objectively reasonable." *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992).

The analogous defense to state-law claims against individual defendants is official immunity. Official immunity is an affirmative defense that protects government employees from personal liability. *Kassen v. Hatley*, 887 S.W.2d 4, 8 (Tex. 1994). Government employees are entitled to official immunity from suit arising from the performance of(1) their discretionary duties (2) in good faith, so long as (3) they are acting within the scope of their authority. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). The test employed under state law is essentially the same as the §

1983 standard. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex. 1994). However, state law has no threshold requirement that a right be clearly established. *Id.* at 657. Rater, official immunity hinges on whether the official's activities were undertaken in "good faith," that is, whether any reasonably prudent official could have believed that the conduct was consistent with the plaintiffs rights. *Id.* at 656-67; *Cantu v. Rocha*, 77 795, 808-09 (5th Cir. 1996).

It is well settled that a public official enjoys qualified immunity not merely from liability, but from suit. *Salas v. Carpenter*, 980 F.2d 299, 301 (5th Cir. 1992). A plaintiff must plead specific facts that if proved, would overcome the defendant's immunity defense; complaints containing conclusory allegations, absent reference to material facts, will not survive a motion to dismiss. *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992).

1. **Procurement and scope of warrants**. The Browns raise numerous complaints concerning the procurement and scope of the warrants. They allege that Wilson knew the affidavits failed to establish probable cause, that he knew the affidavits contained false statements or were recklessly prepared, and that he provided false information that led to the execution of the warrants. They allege that Sheriff Tackitt planned and supervised the participation of the animal activists and media defendants in the raid, and that he applied for the warrant for seizure of "100 + dogs" based on Cicherski's

December 30 affidavit, which he knew or should have known lacked probable cause. They allege that Cicherski conducted an illegal, warrantless search of the Browns' property prior to the raid and that he neglected to disclose this Fourth Amendment violation in any of his affidavits. They allege that Dr. Tull provided advice to the activists and Cicherski concerning how to put the Browns out of business and how many animals to seize. They allege that Dr. Tull advised seizure of all the animals without having seen them and without regard to whether the animals had been mistreated.

An officer is not entitled to qualified immunity in applying for a warrant if a reasonably well-trained officer would have known that the affidavit supporting the warrant failed to establish probable cause and that he should not have applied for the warrant. *Mally v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098 (1986). When the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, qualified immunity will not shield the requesting officer. *Id.* at 344-45, 106 S.Ct. at 1098.

The magistrate judge found that the Browns' allegations are too conclusory and fail to provide sufficient detail to determine whether the affidavits are based on personal knowledge or provide a substantial basis for crediting hearsay statements in the affidavit. The Magistrate Judge, however, was focusing on the January 2 affidavits, concerning which the complaint presents far fewer details. The Browns have clearly alleged that the

December 30 affidavit could not have supported the January 2 warrants because Justice of the Peace Flores who signed the January 2 warrants was not at the courthouse when the two January 2 affidavits were prepared by Wilson for Cicherski. Rather, the warrants were in the possession of either Cicherski or one of the Deputies at or near the front of the convoy that proceeded to the Browns' property for the raid. ¶ 72.[2] The Browns alleged specifically that the January 2 warrants were either based on the December30 affidavit or on no affidavit at all, and that their Fourth Amendment rights were violated by obtaining warrants based on the December 30 affidavit. *Id.* The Browns further alleged at least three reasons the December 30 affidavit lacked probable cause: it was "facially void",[3] it did not contain information to show it

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2. References to "¶" are to paragraphs in plaintiffs' Third Amended Complaint.

3. The magistrate judge concluded that the Browns had not alleged that the December 30 affidavit was a "bare bones" affidavit. An affidavit is "bare bones" if it so deficient in demonstrating probable cause that it renders an officer's belief in its existence completely unreasonable. *United States v. Satterwhite*, 980 F.2d 317, 320-21 (5th Cir. 1992). An affidavit that contains only conclusions and "lack[s] the facts and circumstances from which a magistrate can independently determine probable cause" is considered :bare bones" and cannot be the basis of an objectively reasonable good-faith reliance by an officer. *Id.* at 321. The Browns alleged that the December30 affidavit was

was based on personal knowledge or on information related to the affiant by any other source,[4] and it contained only conclusory allegations. ¶ 62.[5] The Browns have specifically alleged a § 1983 claim against Wilson for his

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"facially void." ¶¶ 62, 73. For this and the other two reasons listed by the Browns, the affidavit qualifies as a bare bones affidavit.

4. Rather, the affiant stated merely, "I have reason to believe and do believe that on or about December 26, 1996. . . ." "Bare bones" affidavits contain wholly conclusory statements, which lack the facts and circumstances from which a magistrate can independently determine probable cause. *See United States v. Brown*, 941 F.2d 1300, 1303 n.1(5th Cir.) (per curiam) (giving as an example, an affidavit that states the affiant "has cause to suspect and does believe" that contraband is located on the premises (quoting *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933))), *cert. denied*, 502 U.S. 1008 (1991).

5. The Court agrees that the failure to describe the specific animals to be seized by number, breed, or location does not mean the affidavit lacked probable cause. Nor is there any allegation that Wilson knew that Cicherski went beyond the area of the Browns' consent in Cicherski's December 22 visit to the Browns' property.

procurement of the warrants.[6]

The Browns do not allege that the Sheriff or the Deputies saw a copy of the "expert report" that put the recipients on notice that the activists were conspiring to turn the raid into a media event with the purpose of seizing all the animals and publicizing the seizure to obtain sympathy and financial contributions. They allege that Sheriff Tackitt somehow acquired this knowledge (¶ 60), but do not indicate that the knowledge was acquired before his application for a warrant. Therefore, it cannot be said that the Sheriff applied for the December30 warrant with the knowledge of the impending "media event."

The Browns also allege that Sheriff Tackitt applied for the December30 warrant based on Cicherski's December30 affidavit without ever having spoken to Cicherski, and that the Sheriff "knew or reasonably should have known from the face of Cicherski's December30 affidavit that it was inadequate to support the existence of probable cause for the issuance of a warrant, contained false or misleading statements, and/or that Cicherski was

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6. The Browns also claim that Wilson provided false information concern his re-drafting of the supporting affidavits on January 2, but the Browns clearly allege that those affidavits were provided after the execution of the seizure warrants. ¶ 74. Wilson's actions after the issuance of the warrants cannot have led to the issuance of the warrants.

reckless in preparing his affidavit." ¶64. Sheriff Tackitt applied for a warrant based on Cicherski's December30 affidavit. *Id.* Cicherski signed his two January 2 affidavits after Justice of the Peace Flores had already issued a search warrant based on the December 30 affidavit. ¶ 71. It is therefore apparent that the warrant Sheriff Tackitt applied for was the one signed by Justice of the Peace Flores prior to January 2. Two additional warrants were executed on January 2 by Justice of the Peace Flores. ¶ 72. Flores was not at the courthouse when the January 2 affidavits were created, therefore those affidavits could not have been the basis for the January 2 warrants.¶¶ 72, 74. Those warrants were based on either the December 30 affidavit or were issued without supporting affidavits. ¶ 72. The complaint is unclear which warrants were actually used to enter the Browns' property, but because the complaint speaks of warrants in the plural, it may be inferred that the January 2 warrants were used.¶¶ 72, 74, 78. This inference is supported by the fact that the warrant Sheriff Tackitt applied for based on the December30 affidavit was to seize "in excess of 100 dogs," (¶ 64) while one January 2 warrant was for dogs and the other for cats (¶ 72). Considering the Browns' complaint as a whole, it is clear that the December 30 warrant was not used in the search. Therefore, the December 30 warrant will not support a claim against Sheriff Tackitt.

The Browns allege that Cicherski failed to disclose in his affidavits that he obtained some of the information contained in his affidavits during an earlier search that violated the Browns' Fourth Amendment rights. As the

magistrate judge pointed out, these allegations defeat Cicherski's qualified immunity defense.

According to the Browns, the warrants are overly broad because they provided for seizure of all their animals without regard to whether they had been mistreated. The Browns attribute this to the advice Dr. Tull provided to Cicherski.¶¶ 53-54. They also allege that in providing this advice to Cicherski, Dr. Tull assumed a duty to the Browns to act with reasonable care, and that by virtue of her training, Dr. Tull should be held to a higher standard of care. ¶¶ 31-32. The magistrate judge concluded that Dr. Tull was entitled to qualified immunity because the Browns did not allege that Dr. Tull provided false information that led to the issuance of the warrant or that she had any control over Cicherski, and that the allegations fail to establish the warrant was over-broad simply because it called for the seizure of "100+ dogs." Clearly, Texas law provides that only animals that have been "cruelly treated" are subject to seizure. TEX. HEALTH & SAFETY CODE ANN. § 821.022 (Vernon 1992). It would be objectively unreasonable for the state to seize healthy and well-treated animals pursuant to this statute, yet the Browns allege that Dr. Tull advised Cicherski to seize all the Browns' animals even tough she had not seen them, that this advice was given with intentional indifference to and reckless disregard for the actual condition of the specific animals to be seized, and in spite of Dr. Tull's familiarity with the Health and Safety Code provisions. It bears repeating that Dr. Tull is a licensed veterinarian employed by the Texas Department of Health, ¶ 52, and

she is presumably familiar with the Health and Safety Code provisions for the seizure of mistreated animals.

Dr. Tull had never seen the animals, let alone examined them. Yet she provided the impetus to Cicherski, who relied on her advice, for the seizure of all the Browns' animals. Apparently very few animals had actually been mistreated because the Deputies instructed all but eight of the animals to be returned to the Browns that morning. ¶¶ 86, 88. "A government official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the warrant." *Hart v. O'Brien*, 127 F.3d 424, 448-49 (5th Cir. 1997). Dr. Tull, as a state official, was reckless in advising Cicherski to request a warrant for the seizure of all the Browns' dogs without having first ascertained that those dogs had been "cruelly treated." Further, it was objectively unreasonable for a state official in Dr. Tull's position to provide this advice for use in an affidavit in support of a search warrant for mistreated animals. She is therefore not entitled to qualified immunity.

2. Failure to dissuade. The Browns allege that Wilson, Sheriff Tackitt, and Dr.Tull never attempted to protect the Browns' constitutional rights or to dissuade Cicherski from proceeding with the mass trespass despite their knowledge of the planned media event. ¶ 60. First, the Browns have not alleged that Dr. Tull, a state officer, exercised any authority or control over Cicherski, a Wilson County official, that could stop him from

conducting the seizure. Second, they have pointed to no authority that established a constitutional duty on the part of Wilson and Sheriff Tackitt (or Dr. Tull for that matter) to suddenly exhibit a change of heart and attempt to discourage Cicherski from going ahead with the raid. *See Hart*, 127 F.3d at 450. These claims will be dismissed.

3. Missing does. The Browns allege that the activists removed their animals at the direction of the Deputies, but that 12 of their dogs were never returned. The magistrate judge recommended dismissal of this claim because there was no allegation that the seizure of the dogs exceeded the scope of the warrants. Further, the magistrate judge found there is no due process violation because the Browns have a meaningful post-deprivation remedy in the Texas tort of conversion. The Fourth Amendment, however, requires that all searches be reasonable, and that the manner of the warrant's execution must be objectively reasonable. The Browns allege that the Deputies and other Wilson County officials failed to supervise the animals' removal, failed to keep track of which animals were removed from which pens, which animals were removed from the property, who was removing the animals, where the animals were being taken, or even who was on the Browns' property. ¶¶ 86-88. The Browns have stated a §1983 claim against the Deputies for the missing dogs.[7]

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7. The Browns have not alleged that Sheriff Tackitt was present during the raid. Supervisory officials are not liable under §1983 for the actions of subordinates on any theory

4. Good-faith exception. The magistrate judge found that the Sheriff and Deputies were protected by the good-faith exception to the exclusionary rule. An officer may rely in good faith on the validity of a warrant so long as the warrant is supported by more than a "bare bones affidavit." *United States v. Pofahl*, 990 F.2d 1456, 1474 (5th Cir. 1993). As indicated already, the complaint can be fairly read as alleging that the December 30 affidavit, which was the only one that could have supported the January 2 warrants, was a bare-bones affidavit. Therefore, the Sheriff cannot rely on the good-faith exception. The Browns raise no similar allegations regarding the Deputies, and they are entitled to qualified immunity based on the good-faith exception.

5. Participation of third parties in execution of the warrants. A large number of persons described as animal-rights activists helped plan and took part in the raid

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of vicarious liability, and the doctrine of respondeat superior does not apply to such actions. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992). Generally, a supervisor may be held liable only if there exists, either (1) his personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Id.* The Browns do not allege that the Sheriff was personally involved in the removal of the animals or in the supervision of the persons involved in the raid, nor is there any causal connection alleged between the Sheriffs actions and the constitutional violation.

in addition to reporters from two local newspapers and reporters and camera crews from four local television stations.[8] Wilson, Cicherski, Sheriff Tackitt, and Dr. Tull knew that the activists were conspiring with the television defendants to participate in the raid with the express intent to seize all the Browns' animals, including their valuable breeding stock, whether the animals were mistreated or not, in order to put the Browns out of business and to serve as a warning to other animal breeders. ¶¶ 44, 56-58, 60. The activists enlisted participation by the media so that the publicity generated by the raid would gamer the activists sympathy and financial contributions for their causes. *Id.* These were obviously not legitimate law-enforcement purposes, and Wilson, Cicherski, Sheriff Tackitt, and Dr. Tull were on notice that the activists were there for reasons other than to simply assist the law-enforcement authorities seize and carry away the animals. By the morning of the raid, the Deputies assisted the activists and the media defendants in entering the Browns' property, and in seizing the animals.¶¶ 78-80. The Deputies failed to properly supervise the persons involved in the raid, and made no attempt to control the hordes of activists and media representatives. ¶¶ 80-81. In addition, neither the activists nor the media were listed as participants on the warrants.

The magistrate judge found that officials do not

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8. There were approximately 100 persons altogether who descended on the Browns' property including 75 animal-rights activists and journalists.

violate the Fourth Amendment by using the services of a third party unless that party is present to conduct an independent search. *See Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). Therefore, the magistrate judge reasoned, absent allegations that the official defendants knew or should have known the activists and the reporters would exceed the scope of the warrant by conducting their own search, they are entitled to qualified immunity. The official defendants, however, knew precisely that the activists and reporters were there in pursuit of their own agendas. The official defendants knew first that none of the activists or reporters were mentioned in the affidavits or the warrants They also knew that the activists were motivated by their desire to confiscate all the Browns' animals, to put them out of business, and to obtain by way of the media coverage sympathy for their cause and financial contributions for their organizations. The official defendants knew the media were there searching for a story to increase their circulations and viewers, and ultimately to increase their revenues.

The issue then is whether clearly established law prohibited law-enforcement officials from bringing along on a search conducted on private property persons not named in the warrant who were there to further their own ends rather than to assist with the search, and, if so, whether it was objectively reasonable for the officials to believe that their actions did not violate clearly established law as it existed at the time of the search.

a. <u>Clearly established law</u>. For the legal rules to be

considered clearly established, the contours of the right alleged to have been violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). The inquiry ends if from an examination of Supreme Court and Fifth Circuit precedent it may be determined that a legal principle is clearly established. *Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995); *Boddie v. City of Columbus. Miss.*, 989 F.2d 745, 748 (5th Cir. 1993). In the present case, no such precedent exists, but that does not end the inquiry.[9] In order to preclude qualified immunity, it is not necessary that "the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039.

The Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment, provides:

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9. "The paucity of similar factual scenarios that have found their way into published legal opinions may be attributable to law officers acting in a more responsible and professional manner than [the police officer] acted on this occasion. Or in those instances where similar abuses took place, perhaps the victims either were without the resources to call the officer's hand or chose to avoid further involvement with a justice system so lacking in common sense and reasonableness." *Atwater v. City of Lago Vista*, 165 F.3d 380, 384 (5th Cir. 1999).

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Supreme Court and the Fifth Circuit have repeatedly emphasized that the principal object of the Fourth Amendment is to restrain government intrusions into the private lives and homes of individual citizens. *See Payton v. New York*, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379 (1980) (Fourth Amendment's principles apply to all government invasions of the sanctity of one's home and the privacies of life); *United States v. United States District Court*, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134 (1972) (physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed); *Silverman v. United States*, 365 U.S. 505, 511, 81 S.Ct. 679, 682, 5 L.Ed.2d 734 (1961) ("at the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *Boyd v. United States*, 116 U.S. 616, 626-27 (1886) (purpose of the Fourth Amendment is to prevent arbitrary government intrusion into the home); *Atwater v. City of Lago Vista*, 165 F.3d 380, 389 (5th Cir. 1999) ("the central concern of the Fourth Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government

officials...." (quoting *United States v. Ortiz*, 422 U.S. 891, 895, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975))). Such concepts did not, of course, originate with the Fourth Amendment, but are deeply rooted in the common law. The Browns have an absolute right, as old as the common law, to keep all strangers out of their home and property who are not privileged to be there. In *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604), the King's Bench resolved that "the house of every one is to him as his castle and fortress," *id.* at 195, and prohibited the government from forcibly entering a home at the behest of a private party, *id.* at 198. William Pitt elaborated upon the sanctity of the home in his impassioned defense of private homeowners against discretionary government searches before Parliament in 1766.

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter–all his force dares not cross the threshold of the mined tenement!

Payton, 445 U.S. at 601 n.54, 100 S.Ct. at 1388 n.54. The Supreme Court expressed "no doubt that Pitt's address . . . echoed and re-echoed throughout the Colonies . . ." *Id.*

As a general rule, law enforcement may only intrude on private property with a search warrant issued by a neutral magistrate based on probable cause, *Johnson v.*

United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369 (1948), or under a specific exception to the warrant requirement, *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 2046 (1971). The primary reason for the warrant requirement is to interpose a "neutral and detached magistrate" between the citizen and "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. at 14, 68 S.Ct. at 369.

It has long been clearly established that there is a constitutional right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV; *New Jersey v. T.L.O.*, 469 U.S.325, 337, 105 S.Ct. 733, 740, 83 L.Ed.2d 720 (1985); *Camara v. Municipal Court*, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967). "The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those that are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 259 (1991) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). It is further settled that the Fourth Amendment's protections against arbitrary searches and seizures are presumptively applicable not only in an individual's home, but also in any commercial premises he or she may own or use. *United States v. Blocker*, 104 F.3d 720, 726 (5th Cir. 1997). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541,543, 87 S.Ct. 1737,1739,18 L.Ed.2d 943 (1967).

A search is permissible in its scope, and therefore

reasonable, when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. *T.L.O.*, 469 U.S. at 342, 105 S.Ct. at 743; *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S.Ct. 2737, 2749 n.11 (1976). Officers, in conducting a search, must limit themselves to actions for which the warrant clearly provides, see e.g., *Bivens v. Six Unknown Named A2ents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (the Fourth Amendment strictly confines an officer executing a search warrant to the limits set by the warrant), or that the warrant implicitly authorizes because they are necessary to its execution, *see e.g. Michigan v. Summers*, 452 U.S. 692, 705, 101 S.Ct. 2587, 2595 (1981) (warrant to search for contraband implicitly provides limited authority for detaining occupants during the search) and *United States v. Fortenberry*, 860 F.2d 628, 636 (5th Cir. 1988) (evidence "not described in a search warrant may be seized if it is "reasonably related to the offense which formed the basis for the search warrant).

Reasonableness depends on how a search is carried out. *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 1699 (1985). The question is "whether the totality of the circumstances justified a particular sort of search or seizure." *Id.* at 8-9, 105 S.Ct. at 1700. In determining the reasonableness of the scope of the search, the "nature and quality of the intrusion" is balanced against "the importance of the governmental interests alleged to justified the intrusion." *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983).

The search in this case was unreasonable, and therefore violated the Fourth Amendment, for at least three reasons: persons accompanied the officials who (1) were not named in the warrants (or in the supporting affidavits), (2) were not performing legitimate law-enforcement functions, and (3) were there in pursuit of their own private objectives, which were not law- enforcement objectives.

Inviting persons to participate in a search and seizure who are not named in the warrant or mentioned in the supporting affidavit is unreasonable unless their presence is reasonably necessary to accomplish the purposes of the search. *Swate v. Taylor*, 12 F.Supp.2d 591, 595 (S.D. Tex. 1998). Texas law permits a officer to obtain assistance in the execution of a warrant from citizens "bound to aid in the execution of the same."[10] See e.g., United States v. Clouston, 623 F.2d 485, 486-87 (6th Cir. 1980) (telephone company employees' role was limited to aiding the officers authorized to conduct a search for electronic equipment by identifying property of

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10. "In the execution of a search warrant, the officer may call to his aid any number of citizens in this county, who shall be bound to aid in the execution of the same." TEX. CODE CRIM. PROC. ANN. art. 18.08 (Vernon 1977). *Cf.* 18 U.S.C. § 3105 (1994) (allowing unauthorized persons to attend execution of warrant when providing aid to the officer, at the officer's request, and in the officer's presence).

their employer); *United States v. Schwimmer*, 692 F.Supp. 119, 126-27 (ED. N.Y. 1988) (a private computer expert was authorized by the search warrant to locate computer files). To come within the scope of the statute, therefore, a person who is not authorized by the warrant to search must be there to aid the authorized officer in the execution of the warrant. That is, the third person's participation must be designed to advance the specific purpose that justified the intrusion in the first place. Otherwise, they are not "bound to aid in the execution of the [warrant,]"[11]

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11. According to the Model Rules for Law Enforcement Officers, a 1974 publication prepared by the Texas Criminal Justice Council, civilian participation in the execution of a warrant was prohibited unless absolutely necessary:

> No persons other than peace officers, police legal advisors, and members of the district attorney's office shall be permitted to accompany officers in the execution of the warrant, unless absolutely necessary.

Texas Criminal Justice Council, Model Rules For Law Enforcement Officers: A Manual on Police Discretion § 4.02 (1974). The comment to this section provided: "Section 4.02 prohibits non-police personnel, such as press and media representatives from accompanying officers." *Id.* at 257. The comment further adds that "technical experts," such as a locksmith, "have a legitimate reason to go along." *Id.* at 258.

A search is also unreasonable when persons accompanying the officers are engaged in a mission distinct from that of the proper and lawful execution of the warrant. Here, the activists were on the Browns' property to put them out of business, to confiscate their animals, and to obtain publicity, sympathy, and contributions. The media were there to furnish publicity to the activists and to obtain stories to increase their readership and viewership. These motivations were known by the official defendants. As already indicated, it has been established in the common law at least since 1604 that "[e]ven a duly authorized officer could not execute a warrant to further the purposes of a private individual." *Buonocore*, 65 F.3d at 354 (citing *Semayne's Case*, 77 Eng. Rep. 194 (K.B.1604); *Burdett v. Abbott*, 104 Eng. Rep. 501, 560-61 (K.B. 1811)).

Thus, the law was clearly established when the search occurred in January 1997 that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate the invasion of the home and privacy of another for purposes unrelated to those specified in the warrant by third persons not authorized by the warrant to be there, not serving any legitimate law-enforcement purpose in being there, and, on the contrary, who were there in pursuit of their own selfish purposes. *Swate*, 12 F.Supp.2d at 595. This unlawfulness is apparent in light of pre-existing Fourth Amendment law;

no case involving these particular facts is necessary to establish that unlawfulness.[12] "Clearly established" includes not only specifically adjudicated rights but those manifestly included within more general applications of the core constitutional principles invoked. Here the core Fourth Amendment principles, recognized in innumerable cases by the Supreme Court and the Fifth Circuit include privacy, the sanctity of the home, and the requirement that searches must be reasonable.[13]

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12. *See e.g., Creamer v. Porter*, 754 F.2d 1311, 1317-18 (5th Cir. 1985) (few cases have dealt with searches that exceed the permissible scope of a warrant where items are unambiguously identified because the Fourth Amendment clearly proscribes such excesses).

13. "It is familiar history that indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton*, 445 U.S. at 583, 100 S.Ct. at 1378. Early in our history James Otis remonstrated against general warrants, in part because they were not directed solely at authorized officers acting on behalf of the government but could be executed at the request of anyone, and because they constituted an improper invasion of a person's cherished right to privacy, particularly in his own home. Writing for the Court in *Stanford v. Texas*, 379 U.S. 476, 481-82, 85 S.Ct. 506, 510 (1965), Justice Stewart explained:

> Vivid in the memory of the newly

b. Objective reasonableness. It might be argued

> independent Americans were those warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Boyd v. United States*, 116 U.S. 616, 625 [6 S.Ct. 524, 530(1886)].

See also Swate, 12 F.Supp.2d at 593-94 (discussion of writs of assistance).

that the activists and reporters could have assisted (and some probably did) the relatively few law-enforcement officials present to remove the large number of animals. But this misses the point. If more hands were needed to accomplish the physical labor required to execute the present warrants, the responsible officials should have explained this to the officer issuing the warrant, and the latter officer should have identified the persons accompanying the officers in the warrant itself. Further, if additional help was needed to remove the animals, why bring along a mob of people with a vendetta against the Browns? The responsible officials should instead have obtained the necessary assistance from other law-enforcement officers, or, failing that, they should have at the very least recruited citizens–identified in the affidavits and warrants–who harbored no evil designs against the Browns and their business. Therefore, if it was reasonable for the officials to obtain assistance, it was *unreasonable* to obtain *this* assistance.

The video and sound recordings made by the media were likewise unnecessary to the purposes of the search. If they were necessary, the fact tat sounds and images would be recorded should have been mentioned in the affidavits and warrants, and the executing officers should have brought their own cameras and tape recorders rather than bringing in members of the independent news media, unsupervised by the officers, to record the sounds and images for them. Having the press, as opposed to the officers, record the sounds and images intensifies the privacy invasion with no corresponding gain in advancing

a law-enforcement purpose.

The official defendants knew the activists and reporters were not identified or mentioned in the warrants, They knew the activists were there to put the Browns out of business and to generate publicity (and contributions) for their cause. They knew the media were not brought on the Browns' property to serve purposes related to the execution of the warrant; rather, they were engaged in an entirely different search–a search for anything dramatic or entertaining that might make a good news story. All were there acting independently and in furtherance of their own motives. None were there to aid the officers in the actual execution of the warrant, except insofar as tat execution actually aided the *activists* in *their* purpose of putting the Browns out of business by confiscating their animals, including their valuable breeding stock. If such a spectacle can be justified after the fact by arguing that the third persons were only there to help, the carefully limited scope of a warrant becomes meaningless in the face of an officer's (or a court's!) post-hoc speculation that some amorphous law-enforcement purpose was served by the presence of the third parties.[14] If this is the law, there are no limits to the unnamed multitudes who may accompany an officer in the execution of a warrant for their own

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14. The officers could as easily justify bringing anyone and everyone along on the search–a business person's competitors, the suspect's neighbors, a high-school civics class, or any passerby–all to be recorded and reported by the media.

purposes; it opens the doors of every home and business in this country to invasion by hordes of one's enemies, all of which may be reported and filmed by the media for display to the world.[15]

The official defendants knew full well that the activists and reporters served no legitimate law-enforcement purpose. Nothing in the circumstances of the search plausibly required a reasonable, responsible officer to bring private third parties onto the Browns' property and into their home who were there only to exploit the warrants for their own purposes. *Swate*, 12 F.Supp.2d at 596. No reasonable official could have

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15. The resulting tyranny if warrants could issue at the behest of and be executed private citizens was vividly described by James Otis in his attack on writs of assistance in *Lechmere's Case*:

> What a scene does this open! Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbour's house, may get a writ assistance; others will ask it from self defence; one arbitrary exertion will provoke another, until society will be involved in tumult and in blood.

Buonocore, 65 F.3d at 355 (emphasis deleted) (quoting 2 Legal Papers of John Adams at 134-44).

thought otherwise.[16]

No objectively reasonable law-enforcement officer could have believed that allowing participation by a horde of activists intent on pursuing their own private political and financial agendas would comport with the Fourth Amendment. No objectively reasonable law- enforcement officer could have believed that permitting the invasion of the Browns' privacy to be reported and filmed for later distribution to the world solely for the profit of the media organizations involved would comport with the Fourth Amendment. No objectively reasonable law-enforcement officer could have concluded that inviting any third party to participate in a search and seizure who was not named in the warrant and who was not aiding in the execution of the warrant accorded with Fourth Amendment requirements.

The contours of the Browns' rights were sufficiently clear that a reasonable official in defendants'

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16. In fact, the presence of the activists and the media on the Browns' property was nothing less than state-supported trespass and invasion of privacy. The Browns did not consent to their presence (¶ 38) and these people could not have entered their property without that consent. They did just that, however, when they accompanied the officers onto the Browns' property and into their home. The Fourth Amendment was designed to limit just such abuses of government power.

position would have understood that what they were doing violated those rights. *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039. The purpose of the Amendment and the decisions of the Supreme Court and Fifth Circuit implementing its original intention have been to restrain government conduct and limit its intrusiveness, not to authorize unlimited and uncontrolled access to private residences and businesses.

The official defendants' motions to dismiss the Browns' § 1983 claims based on the participation in the raid of the activists and media is DENIED.

B. State-law claims.

The Browns complain that "[w]ithout discussion or explanation, the Memorandum erroneously dismisses the Browns' state law claims against Wilson and Tull. They also object to the dismissal of "any claims" against Cicherski. The magistrate judge apparently decided that the official defendants were immunized from these claims by the doctrine of official immunity. If that were the case, however, the magistrate judge should have reviewed each of the Browns' state-laws claims and explained in each case whether the official's actions were objectively reasonable. Because there has been no recommendation on these state-law claims, the Court will consider them as pending, and dismissal of those claims will not be granted.

[Portions of order pertaining to private defendants has not been reproduced in this Appendix]

SIGNED and ENTERED March 31, 1999.

/s/_____
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Filed July 10, 2001]
No. 00-50893

ALAN BROWN; LOIS BROWN,
Plaintiffs-Appellees,

v.

WILSON COUNTY, Etc.; ET AL.,
Defendants

JOSEPH CICHERSKI, Wilson County Animal Control Officer in his official and individual capacity; JOE D. TACKITT, Wilson County Sheriff in his official and individual capacity; JASON PRICE, Sheriff's Deputy in his individual and official capacity; CHRISTOPHER AYALA, Sheriff's Deputy in his individual and official capacity;
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-97-CV-1473

ON PETITION FOR REHEARING

Before SMITH, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellees' motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED BEFORE THE COURT:

/s/_____
James L. Dennis
United States Circuit Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

[Filed October 20, 1998]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs	)
v.	)
WILSON COUNTY, et al., Defendants	)

PLAINTIFFS' THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

COME NOW Plaintiffs Alan Brown and Lois Brown ("the Browns") and file this their third amended complaint.

I. Parties

1. Plaintiffs Alan Brown and Lois Brown are individuals who reside in Wilson County, Texas.

2. Defendant Wilson County ("the County") has been served and appeared herein.

3. Defendants Jason Price, Sgt. Sprow, and Christopher Ayala, are law enforcement officers of the Wilson County Sheriff's Department (collectively "the Sheriff's Deputies"), and are being sued in their individual capacities. The Sheriff's Deputies have been served and appeared herein.

4. Defendant Joe D. Tackitt is the Wilson County Sheriff and is being sued in his official and individual capacities. Sheriff Joe D. Tackitt has been served and appeared herein.

5. Defendant Joseph Cicherski is the former Wilson County animal control officer ("Cicherski"), sued in both his official and individual capacity, has been served and appeared herein.

6. Defendant Russell Wilson, currently the Wilson County Attorney ("Wilson"), sued in his official and individual capacities, has been served and appeared herein.

7. Defendants Wayne R. Deason and Deason Animal Hospital, Inc. (collectively "Deason"), have been served and appeared herein.

8. Defendant Cat Fanciers' Association, Inc., has been served and made an appearance herein.

9. Defendant Pam Delabar has been served and made an appearance herein.

10. Defendant Southern Animal Rescue Association, Inc. has been served and made an appearance herein.

11. Defendant Tracy Frank has been served and made an appearance herein.

12. Defendant John Helton has been served and made an appearance herein.

13. Defendants Scott Gossett and Judy Gossett (collectively "the Gossetts") have been served and appeared herein.

14. Defendant Hill Country Greyhound Adoption, Inc. has been served and made an appearance herein.

15. Defendant Patricia Massey has been served and made an appearance herein.

16. Defendant Ray Massey has been served and made an appearance herein.

17. Defendant Humane Society of Bexar County, Inc. has been served and made an appearance herein.

18. Defendant Harry Oliver has been served and made an appearance herein.

19. Defendant The Brighter Days Horse Refuge, Inc. has been served and made an appearance herein.

20. Defendant William Weatherholtz has been served and made an appearance herein.

21. Defendant Conover Veterinary Hospital, P.C. has been served and made an appearance herein.

22. Defendant Ward S. Conover, D.V.M. has been served and made an appearance herein.

23. Defendant Harte-Hanks Communications, Inc., d/b/a KENS-TV has been served and made an appearance herein.

24. Defendant Chesapeake Television, Inc., d/b/a KABB-TV has been served and made an appearance herein.

25. Defendant UTV of San Antonio, Inc., d/b/a KMOL-TV has been served and made an appearance herein.

26. Defendant Post-Newsweek Stations, San Antonio, Inc., d/b/a KSAT-TV has been served and made an appearance herein.

27. Defendant The Hearst Corporation, d/b/a The San Antonio Express-News has been served and made an appearance herein.

28. Defendant Wilson County News has been served and made an appearance herein.

29. Defendant Catherine Tull ("Tull") has been served and made an appearance herein.

30. Defendants set out in paragraphs 10 through 12 are collectively "SARA," a term which includes the agents and employees of Defendant Southern Animal Rescue Assoc., Inc. Defendants set out in paragraphs 8 through 14 and 16 through 20 are collectively "Animal Activists." Defendants set out in paragraphs 21 and 22 are collectively "Conover." Defendants set out in paragraphs 23 through 26 are collectively "Television Defendants." Defendants set out in paragraphs 27 through 28 are collectively "Newspaper Defendants." Defendants set out in paragraphs 2 through 29 are collectively referred to as "Defendants."

II. Jurisdiction

31. This Court has jurisdiction over this lawsuit because the action arises under the Fourth, Fifth and Fourteenth Amendment to the United States Constitution, and 42 U.S.C. §1983. Jurisdiction is conferred upon this court by 28 U.S.C. §1331.

32. This Court has supplemental jurisdiction over the Browns' state law claims under 28 U.S.C. § 1367 because the claims are so related to the claims within the Court's federal question jurisdiction that they form part of the same case or controversy under Article 3 of the United States Constitution.

III. Facts

33. Between 9:30 and 10:00 on the morning of January 2, 1997, approximately 75 persons converged upon the Browns' home and entered the Browns' property. The Browns were told that those 75 people were there for the execution of seizure warrants for the Browns' dogs and cats. Those entering upon the Browns' property included the Sheriff's Deputies; Cicherski; Animal Activists with trucks, livestock trailers and pet carriers to take away animals; Television Defendants, complete with four television camera crews; Newspaper Defendants; and many persons never identified (collectively "Trespassers"). Some Defendants have described what occurred on the Browns' property that morning as a "media circus."

34. The Browns were ordered by the Sheriff's Deputies to stand back to allow Cicherski, the Animal Activists and the Television and Newspaper Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), and the unidentified animal activists, full access to their property and home because they were

acting in concert with and under the authority of and on the behalf of Wilson County.

35. The Animal Activists scattered, wandering through the Browns' yard, the house, the kennels, barns, paddocks and pastures. They examined dogs and cats, as well as horses, hogs and cattle. Upon the signal to "round them up" given by Deputy Price, the Trespassers started removing dogs from their pens and placing them in the Animal Activists' vehicles parked both on and off the Browns' property.

36. The Television and Newspaper Defendants likewise scattered and wandered through the Browns' yard, the house, the kennels, barns, paddocks and pastures. They accosted the Browns for statements, eavesdropped on private conversations, interviewed the other raid participants, and selectively videotaped and photographed portions of the activities for later dissemination.

37. The Trespassers took photos, videos and other images of the Browns' home, private property, animals and persons without the permission or consent of the Browns. The Television Defendants broadcast these images all over the San Antonio television viewing area and throughout the state. These photos, videos, and other images were published and broadcast by the Trespassers to further their personal and commercial interests to the detriment of the Browns and their reasonable expectations of privacy.

38. The Browns neither invited nor permitted the Trespassers' entry onto their property and into their private home on January 2, 1997. No one ever asked for or received the Browns' consent. Any implied consent given by the Browns to anyone to enter their property or home on January 2, 1997 was given under duress and/or threat of criminal prosecution.

39. For several years, the Browns have bred and sold cats and dogs directly to the public. Additionally, the Browns raise cattle and horses for profit on their property located in Wilson County, Texas. Although the Browns' property is private and not open to the general public, the Browns allow interested buyers to make appointments for the sole purpose of viewing specific dogs and cats that are offered for sale. The Browns allow prospective purchasers limited access to their property and home for the specific purpose of viewing and purchasing specific dogs and cats that are offered for sale, after the purchasers have set appointments after calling in advance.

40. The Browns had a reasonable expectation of privacy that customers coming to their home would confine their activities to the areas of the Browns' home and property where puppies were offered for sale.

41. Wilson County employed Cicherski in the Wilson County Health Department as its sole Animal Control Officer.

42. Tracy Frank is the director and her husband, John

Helton, is a board member of Southern Animal Rescue Association, Inc. ("SARA"). Frank believes that all dogs and cats should be spayed and neutered and opposes the commercial breeding of dogs and cats.

43. At some time prior to December 22, 1996, Cicherski and Tracy Frank planned an unannounced, covert, warrantless search and inspection of the Browns' property and livestock, including their dogs and cats. The provocation for this plan was the Browns' business practice of advertising puppies for sale in the classified section of the San Antonio Express-News. The purpose of this warrantless search was to manufacture justification for a warrant to seize the Browns' animals, then to contact multiple animal activist groups to assist Wilson County in executing the warrant, and to publicize the seizure by notifying all of the local television stations in advance so that they could provide publicity by broadcasting Wilson County and the Animal Activists in the act of executing the seizure of the Browns' animals.

44. The goal of the planned publicized raid on the Browns' property was to put the Browns out of the business of breeding dogs and to send a warning message to breeders generally to get out of the business of raising dogs for sale.

45. On or about December 22, 1996, Cicherski, Tracy Frank, John Helton and Judy Gossett (a SARA volunteer) initiated the first stage of their plan. Subsequent to a telephone inquiry to Mrs. Brown regarding purchasing a

puppy advertised in the newspaper, Cicherski, Tracy Frank, John Helton and Judy Gossett rode together out to the Browns' home, where they masqueraded as potential purchasers in order to deceive Lois Brown into granting them limited access to the puppies located in her home. This entry by deception was an intrusion upon the Browns' privacy and constituted a warrantless search conducted on behalf of Wilson County under the direction and control of Cicherski.

46. Neither Cicherski, Tracy Frank, John Helton nor Judy Gossett identified themselves or their affiliations to the Browns or informed the Browns of the true and official purpose of the December 22 intrusion and warrantless search.

47. Without permission, Cicherski, Tracy Frank, John Helton and Judy Gossett went beyond the areas to which they had been granted limited access through their deception and into the adult dog area outside of the home, apart from where the puppies for sale were located. This uninvited intrusion into and warrantless search of the segregated kennel area violated the Browns' reasonable expectation of privacy. The uninvited intrusion and warrantless search also unnecessarily disturbed the animals not for sale, caused the breeding animals extreme anxiety, and disrupted the animals' schedule.

48. Cicherski knew that neither he, Tracy Frank, John Helton nor Judy Gossett were veterinarians or had any other specialized training in determining whether animals

have been properly cared for, yet after leaving the Browns' property, Cicherski directed Tracy Frank and Judy Gossett to draft an "expert" report as agents of Wilson County to justify the subsequent publicized appropriation of the Browns' valuable breeding stock.

49. Between the December 22, 1996 warrantless search and January 2, 1997, Tracy Frank contacted and conspired with numerous Animal Activists, Patricia Massey on behalf of Hill Country Greyhound, Inc. and many others whom the Browns have never been able to identify, to secure their participation in a raid on the Browns' property. Some of the Animal Activists contacted by Frank, including Patricia Massey, then contacted or caused to be contacted *other* Animal Activists to secure *their* participation in a raid on the Browns' property. Frank told the Animal Activists that they would be seizing the Browns' animals, and instructed the Animal Activists to meet at the Wilson County Courthouse the morning of January 2, 1997 precedent to converging upon the Browns' property.

50. Between the December 22, 1996 warrantless search and January 2, 1997, Tracy Frank contacted and conspired with the Television Defendants to secure their participation in and broadcast of a raid on the Browns' property. Frank told the Television Defendants that there would be a seizure of the Browns' animals, and instructed the Television Defendants to meet at the Wilson County Courthouse the morning of January 2, 1997 precedent to converging upon the Browns' property.

51. Between the December 22, 1996 warrantless search and January 2, 1997, Tracy Frank contacted and conspired with Conover, a veterinarian, and secured his agreement to board animals seized during the raid on the Browns' property.

52. Between the December 22, 1996 warrantless search and January 2, 1997, Judy Gossett wrote a letter to Defendant Tull requesting Dr. Tull's advice as to how to put the Browns' out of business. Tull is a licensed veterinarian employed by the Texas Department of Health.

53. Between the December 22, 1996 warrantless search and January 2, 1997, Cicherski had multiple telephone conversations conspiring with Tull. Tull instructed Cicherski to seize *all* of the Browns' animals, without having even seen any of the Browns' animals, even though, because of a lack of policies and procedures to guide him and a lack of any supervision by Wilson County, Cicherski sought Tull's advice regarding how many and which of the Browns' animals should be included in the seizure warrant.

54. Cicherski relied on Tull's advice. Cicherski knew that, through her employment with the Texas Department of Health, Tull was familiar with Health and Safety Code provisions pertinent to seizing animals. Tull's advice to Cicherski was made with intentional indifference to and reckless disregard for the actual condition of the specific animals to be seized and with complete disregard for the dictates of the Health and Safety Code.

55. On or about December 28, 1996, Tracy Frank delivered to Cicherski the "expert" report regarding her opinions about the Browns' animals based on the December 22, 1996 warrantless search. The "expert" report was not subsequently acknowledged in any warrants or in any affidavits executed by Cicherski to support the warrants for seizure of the Browns' animals.

56. After receiving the "expert" report from Tracy Frank but prior to January 2, 1997, Cicherski sent the report to Tull and showed the report to County Judge Martha Schnabel and County Attorney Russell Wilson. The "expert" report put Cicherski, Tull and Wilson County on notice that the SARA Defendants were mobilizing people and animal organizations, that Dr. Conover had committed to board seized dogs, and that all of the television news stations in San Antonio were eager to do in-depth stories about the planned raid upon the Browns. The "expert" report further opined that through the media participation in the raid, Animal Activists would be able to generate sympathy – and money.

57. From the time that they saw Frank's "expert" report, Cicherski, Wilson, Schnabel, Wilson County, and Tull knew that the Television Defendants and the Animal Activists (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment) had been and were conspiring to jointly participate in the raid on the Browns' private property with the express intent to seize all animals and to publicize the seizure for reasons other than

legitimate law enforcement business.

58. From the time that they saw Frank's "expert" report, Cicherski, Wilson, Schnabel, Wilson County, and Tull knew or reasonably should have known that seizure of the Browns' animals was being planned as a media event, with the express intent to serve a major purpose other than legitimate law enforcement business.

59. The planned seizure of the Browns' animals was organized as a media event to entice Wilson County, Sheriff Tackitt and/or Russell Wilson to authorize the seizure and to entice the presence and participation of dozens of animal activists, including the Defendant Animal Activists. But for the prior publicity commitment of the Television Defendants to jointly participate in the raid, no warrants for the seizure of the Browns' animals would have issued, and the January 2, 1997 mass trespass upon the Browns' property and into their home and seizure of the Browns' animals would not have occurred.

60. Despite the knowledge that the planned joint participation of the Television Defendants and Animal Activists was for the purpose of and would transform the seizure from a law enforcement operation into a media event, Schnabel, Wilson, Sheriff Tackitt, and Tull never attempted to protect the Browns' constitutional rights or to dissuade Cicherski from proceeding with the planned mass trespass upon the Browns' property and seizure of the Browns' animals.

61. Subsequent to receiving the "expert" report, Cicherski signed at least three different affidavits regarding the Browns' animals, one on December 30, 1996, and two more on January 2, 1997. Both the December 30, 1996 and the January 2, 1997 affidavits executed by Cicherski were insufficient to establish probable cause for the search or seizure of the Browns' animals.

62. The December 30, 1996 affidavit fails to establish probable cause because it is facially void. The December 30 affidavit contains only conclusory allegations, and is neither based on the personal knowledge of the affiant nor is it based on information related to him by any source (named or unnamed). It merely states: "I have reason to believe and do believe that on or about December 26, 1996 . . . ." The December 30, 1996 warrant is further deficient in its failure to specifically describe the specific animals to be seized, the number of animals to be seized, the breeds of the animals to be seized, or where the animals to be seized were located on the Browns' property.

63. Cicherski was intentionally misleading or reckless in preparing the December 30 affidavit because he intentionally or recklessly omitted the basis of his "belief," which was knowledge he gained himself from his December 22 warrantless and covert search of the Browns' home.

64. Sheriff Tackitt applied for a warrant to seize "in

excess of 100 dogs" from the Browns, purportedly based on Cicherski's December 30 affidavit. Sheriff Tackitt signed this undated application for warrant without ever having spoken to Cicherski. Tackitt knew or reasonably should have known from the face of Cicherski's December 30 affidavit that it was inadequate to support the existence of probable cause for the issuance of a warrant, contained false or misleading statements, and/or that Cicherski was reckless in preparing his affidavit.

65. On January 1, 1997, Lois Brown conducted an inventory of her dogs and cats.

66. On January 2, 1997, at approximately 9:00 a.m., the Animal Activists and the Television Defendants rendezvoused at the Wilson County courthouse with Cicherski and the Sheriff's deputies, as they had agreed to do so in their contacts with Frank. Reporters from the San Antonio Express-News and the Wilson County News ("Newspaper Defendants") had not been contacted in advance about the planned raid on the Browns' property, but chose to join the courthouse throng upon learning of the plan that morning. Cicherski was in charge, but offered the assembled persons no instructions. He did not instruct any of the assembled crowd of Animal Activists and Television and Newspaper Defendants regarding the scope of the warrant, which animals could or could not be seized, or whether there was anywhere on the seventy acres of the Browns' property that was off-limits. Nor did Cicherski offer any instructions as to what to do upon arrival at the Browns' property. Cicherski did not even

ascertain the identities of all of the individuals assembled to participate in the raid, or make any effort to assure that he was not inviting convicted thieves to participate in seizures of the Browns' property.

67. Some of the assembled Animal Activists and Television and Newspaper Defendants were under the impression that all of the Browns' animals were to be seized, including livestock. Others were under the impression that only cats and dogs were to be seized. Cicherski even advised some of the gathered Defendants that Lois Brown would be arrested, even though there was no arrest warrant and the seizure warrants were based upon allegations of civil, not criminal, violations. The only information everyone assembled seemed to be universally aware of was that they were to travel convoy style to the Browns' property and once there, remove animals.

68. Two of the assembled Animal Activists, Pam Delabar and Ray Massey, held themselves out as having specialized training in animal cruelty investigations and rescues and sought out the particulars regarding the warrant which Cicherski had failed to convey to the gathering. The Animal Activists and Television and Newspaper Defendants waited outside the courthouse while Delabar, Massey and another Animal Activist, William Weatherholtz, went to County Attorney Russell Wilson's office inside the courthouse.

69. Delabar, Massey and Weatherholtz advised Wilson

that the warrant as worded did not adequately define or limit the scope of the seizure only to animals in distress. They represented to Wilson that the seizure would be illegal and they would be unwilling to take part in execution of the warrant unless it was rewritten.

70. On the morning of January 2, 1997, at the Wilson County Courthouse, with four television stations and dozens of Animal Activists waiting outside, Wilson drafted the January 2 Cicherski affidavits, with the assistance—and at the insistence—of Delabar, Ray Massey and Weatherholtz, non-lawyer, non-law enforcement, non-government, non-veterinarian persons who Wilson knew or reasonably should have known had no first-hand knowledge of the Browns' farm or animals.

71. Cicherski signed these two additional affidavits dated January 2, 1997, after Justice Flores had already issued a search warrant based on the inadequate December 30 affidavit. The two January 2 affidavits were essentially identical to one another except one referred to "dogs" and "puppies," and the other referred to "cats" and "kittens." With the exception of paragraph 5 in the "dog" affidavit, which stated that Cicherski knew Lois Brown had run newspaper ads for puppies for sale, the affidavits contained no averment that they were based on Cicherski's personal knowledge.

72. The two seizure warrants that were actually executed on January 2 contained false statements and/or were recklessly prepared. Justice of the Peace Flores, who

signed the seizure warrants dated January 2, was not at the courthouse when the two January 2, 1997 Cicherski affidavits—one for dogs and one for cats—were created by Wilson with the assistance of the above-named Animal Activists. After Delabar, Weatherholtz, and Ray Massey emerged from Wilson's office, Cicherski, the Sheriff's Deputies, the Animal Activists, including the ones who had been in Wilson's office, and the Television and Newspaper Defendants left directly from the Wilson County courthouse, driving convoy style, and proceeded directly to the Browns' property. The warrants to be executed were in the possession of either Cicherski or one of the Deputies, at or near the front of the convoy. The January 2 Cicherski affidavits therefore could not have been a basis for determining probable cause for the issuance of the seizure warrants executed on the Browns' animals. The two seizure warrants, one for dogs and one for cats, were either both issued based upon the infirm December 30 affidavit, which mentioned only dogs, *or* were issued without supporting probable cause affidavits.

73. Because the December 30 affidavit was facially void, and because Wilson knew or reasonably should have known that the seizure warrants actually executed were not based on the January 2 Cicherski affidavits, the executed warrants were so lacking indicia of probable cause as to render unreasonable Wilson's claimed belief that probable cause existed.

74. By obtaining supporting affidavits after the seizure warrants were issued, Wilson provided false information

that led to the execution of the seizure warrants.

75. Wilson County intentionally or recklessly spoliated evidence through the failure to maintain the files pertaining to the seizure of the Browns' animals, including the warrants and supporting probable cause affidavits. Unlike other files maintained by Emilio Flores' Precinct No. 1 Justice Court, all of the files pertaining to the seizure of the Brown's animals are now in the custody of County Attorney Russell Wilson's office. Included in these files are assorted versions of search warrants and seizure warrants, some executed and some not, some dated and some not, and at least three Cicherski affidavits, in no comprehensible order.

76. Texas law mandates that any affidavit that supported issuance of a search warrant is public information. However, the files, as maintained by Wilson and Justice of the Peace Flores, make it impossible to definitively ascertain what was relied upon to determine that probable cause existed, or even to clearly ascertain which warrants were executed. Wilson County's confusion of the file, including housing the file at the Wilson County Attorney's office rather than at the Justice Court, was intentional or reckless, spoliated evidence, and prevented Plaintiffs from identifying which affidavits, if any, purportedly supported the existence of probable cause for the issuance of warrant(s) to search the Browns' property and seize the Browns' animals.

77. Prior to the January 2, 1997 raid, the Browns had

not received any complaints, nor were they provided any information regarding alleged complaints made to Cicherski, Wilson County, the Sheriff's Department, or the Animal Activists regarding alleged cruelty to or abuse of their animals. At no time prior to the raid and seizure of the Browns' animals were the Browns notified by Cicherski or any Wilson County official of any complaints against them, nor were the Browns informed of any actions they should take to remedy any alleged problems. In addition, Wilson County has no record of any complaints of any nature regarding the Browns. Despite these facts, Cicherski stated *after* the January 2 raid on the Browns' property that prior complaints about the Browns justified his actions between December 22, 1996 and January 2, 1997.

78. On the morning of January 2, 1997, Cicherski and the Sheriff's Deputies entered onto the Browns' property to execute the above-referenced warrants. The Animal Activists (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment) and many persons still unidentified accompanied Cicherski and the Sheriff's Deputies onto the Browns' property and actively participated and assisted in the search and seizure of the Browns' property and livestock.

79. The Television and Newspaper Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment) accompanied Cicherski and the

Sheriff's Deputies onto the Browns' property.

80. The Sheriff's Deputies instructed the Browns to stand back to let the Animal Activists and the Television and Newspaper Defendants "do their jobs." With the televison cameras rolling, Deputy Price gave the signal for the Animal Activists to start rounding up the animals. Some Animal Activists started taking dogs from their pens, without any effort by anyone to keep track of which dogs they were taking or where the dogs had been taken from. The dogs were placed in Animal Activists' vehicles located both on and off of the Browns' property. No one, including Cicherski or any other Wilson County official, made any efforts to identify who had possession of which dogs. Once Trespassers had entered the Browns' property, the Browns could exercise no right of control over any of their animals.

81. After compelling the Browns to allow access to their property and home to the dozens of Trespassers, Cicherski and the Sheriff's Deputies failed to exercise sufficient control over their activities to protect the Browns' privacy and property. Cicherski was in charge, but gave no guidance whatsoever to the Trespassers regarding what they could or could not do, where they could or could not go, or which animals were or were not included in the warrant.

82. Animal Activists and Television and Newspaper Defendants strayed away from the yard area where the dogs were kept and back into the barns, paddocks and

pastures where horses, hogs and cattle were kept. Deputy Sheriff Ayala belatedly advised some of these Defendants that they needed to return to the dog area, and then even escorted some of them away from the livestock pens.

83. The presence of dozens of animal activists on the Browns' property was excessive and unnecessary for the execution of the warrants. The presence of four television stations, represented by four reporters and four cameramen, and two newspapers, represented by two reporters, was also excessive and unnecessary for the execution of the warrants. The Television and Newspaper Defendants were not serving any legitimate law enforcement purpose. This large number of people on the Browns' property at the invitation of Wilson County was patently unreasonable and violated the Fourth Amendment.

84. During the course of the raid on January 2, 1997, the Browns contacted their family veterinarian, Dr. Brumlow, so he could examine the animals alleged to have been abused and hopefully halt the raid. Dr. Brumlow determined that the animals were in good health, and that they had all been well-cared for, with proper food, shelter, and affection, and under his regular veterinary care.

85. In an effort to defeat the findings of Dr. Brumlow, and on behalf of Wilson County, Cicherski and John Helton summoned Deason to join in and justify the raid. Deason identified eight dogs allegedly in poor health, though there was no evidence that these dogs had been

cruelly treated and/or starved. Nevertheless, eight animals were wrongfully seized.

86. Although most of the animals had already been removed from the property and loaded into the Trespassers' vehicles, Cicherski and the Sheriff's Deputies instructed the Animal Activists to return all but the eight dogs identified by Deason to the Browns. Because no one had supervised the animals' removal, they were not returned to their proper pens. Female dogs in season were placed in pens with the wrong males, causing fighting, snarling and sexual activity, thus making it impossible to ascertain which dogs were breeding with each other. Some of the dogs returned were not even placed in pens.

87. Neither Cicherski nor any other Wilson County official kept track of which animals were removed from which pens, which animals were removed from the property, who was removing the animals or where they were being taken. Neither Cicherski nor any other Wilson County official even kept a complete record of ***who*** was on the Browns' property. This failure to keep track of who entered the Browns' property and the failure to guide and control the actions of these people directly led to the theft of at least twelve of the Browns' animals.

88. The eight animals that Wilson County acknowledged seizing were placed in the custody and control of Cicherski. The whereabouts today of the other twelve dogs seized that day are unknown. These missing animals represent a substantial part of the Browns'

breeding stock. Valuable animals were never returned, nor was a treasured family pet, "Bubba." The Browns subsequently reported these twelve dogs as stolen. However, Deputy Sheriff Ayala's investigation based upon the Browns' theft report was precipitously called to a halt without the return of any of the animals.

89. Later on January 2, 1997, Deason intentionally, without court order and in violation of the Health and Safety Code, killed one of the eight dogs acknowledged to have been seized. Certainly this action went beyond the authority granted to Wilson County by the warrant. This dog, "Brown's Suzannah," was a personal and favored pet of the Browns, which Plaintiff Lois Brown had lovingly cared for and hand fed, despite the animal having been weak and sickly since birth, and unable ever to be used to breed.

90. The day of the raid and for several days afterward, the Browns were appalled and humiliated by the extensive and inflammatory media coverage. This unwarranted publicity caused enormous emotional distress, led to further invasions of the Browns' privacy and generated ill will in the surrounding communities, causing the Browns to fear for their safety. The Browns have suffered strangers driving up to their driveway just to stare and harass and have endured numerous crank telephone calls. The damage to the Browns' reputation in the community at large had a traumatic impact on their ability to conduct business and substantially restricted their everyday activities.

91. Some days after the raid, Conover appeared on a local television news program with the Browns' seven surviving seized dogs. With the Browns' dogs as his backdrop, Conover capitalized on the seizure of the Browns' dogs for his own publicity purposes and political agenda, advocating the need for legislation to regulate dog breeders.

92. Several days after the raid, on or about January 10, 1997, the Justice Court ordered that the seven surviving seized dogs be delivered to the Browns' veterinarian, Dr. Brumlow, for his examination, and were thereafter returned to the Browns on his recommendation. Before the animals were returned to the Browns, they were variously in the custody and control of Cicherski, SARA, and Conover.

93. Wilson County did not provide Cicherski with any rules, guidelines or policies to assist him in the execution of his official duties that would have prevented the deprivation of the Browns' constitutional rights. Further, Wilson County failed to provide any policy for tracking and recording complaints received for allegedly mistreated animals.

94. Wilson County failed to train and/or inadequately trained Cicherski regarding the execution of his authority as Wilson County's Animal Control Officer. Specifically, Cicherski received no or inadequate training regarding the necessity for probable cause to support seizure of animals. Cicherski also received no or inadequate training regarding

the reasonableness strictures that the Fourth Amendment places on searches and seizures. This lack of adequate training was the direct cause of violations of the Browns' federally protected rights. Wilson County's failure to adequately train Cicherski amounted to deliberate indifference to the rights and welfare of Wilson County's citizens, including the Browns.

95. Cicherski notified Wilson County's policy makers—Schnabel, Wilson, and Sheriff Tackitt—prior to the raid of facts sufficient to put Wilson County on notice that the Browns' constitutional rights would be violated. After being placed on notice, Wilson County failed to take action to prevent the deprivation of the Browns' constitutional rights.

IV. CONSTITUTIONAL DEPRIVATIONS IN VIOLATION OF 42 U.S.C. § 1983

96. Paragraphs 33-95 are incorporated herein.

97. The December 22, 1996 warrantless search of the Browns' property, conducted by Cicherski, Frank, Helton and Gossett, all acting under color of state law, proximately caused violations of the Browns' Fourth Amendment right to be free from unreasonable searches and seizures, rights guaranteed by the Fourth and Fourteenth Amendments of the U.S. Constitution.

98. The planning and participation in the joint raid and seizure on January 2, 1997 by Cicherski, Wilson County,

Tull, Wilson, Sheriff Tackitt, Sheriff's Deputies, with the active participation of the Animal Activists and the Television and Newspaper Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), Deason, Conover, and unidentified animal activists violated the Browns' rights guaranteed by the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution.

99. The raid of the Browns' property and livestock was jointly conceived and planned by Wilson, Cicherski, Tull, Sheriff Tackitt and the Sheriff's Deputies, Conover, the Animal Activists, the Television Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), and unidentified animal activists. Legitimate law enforcement purposes were not the conspirators' motivation.

100. The Justice of the Peace did not have the authority to issue the warrants. The value of the property to be seized exceeded the jurisdictional limits of the Justice Court imposed by the Texas Constitution.

101. The warrants were not supported by probable cause. At the time the warrants were executed it was apparent that probable cause did not in fact exist to support the seizure of any of the Browns' animals. Cicherski, Tackitt, and Wilson all knew or reasonably should have known that the affidavits purportedly

supporting the warrants contained false statements or were recklessly prepared. Because the warrants were not supported by probable cause and probable cause did not exist when the warrants were executed, the Browns were unconstitutionally deprived of their privacy and property.

102. Cicherski, Sheriff Tackitt, the Sheriff's Deputies and Wilson, on behalf of Wilson County, conspired, planned, engaged in and supervised the active participation of the Animal Activists, including Patricia Massey, and the Television and Newspaper Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), Deason, and many unidentified animal activists in the January 2, 1997 raid of the Browns' property and livestock, as well as invited televised broadcast of the execution of the warrants. These joint actions constituted an unreasonable search and seizure and were conducted under color of state law in violation of the Browns' civil rights under 42 U.S.C. § 1983.

103. The joint actions of the Trespassers in willful and active participation in concert with Cicherski, Wilson County, Sheriff Tackitt and Wilson, in their official capacities, to execute search and seizure warrants, coupled with their agreement to willingly allow the media to televise and publish the search and seizure, as well as to participate in the search and seizure, gives rise to characterizing the Television and Newspaper Defendants, Patricia Massey and the Animal Activist (including and their agents and employees, who at all relevant times were

acting within the course and scope of their agency or employment), Deason, and the unidentified animal activists as governmental actors.

104. Further, Defendants under color of state law jointly planned and participated in the televised raid of the Browns' homestead in furtherance of the private, political and publicity interests of the Defendants which did in fact violate the Browns' civil rights under color of state law in violation of 42 U.S.C. § 1983.

105. Wilson County failed to provide Cicherski with adequate training and supervision and this failure proximately caused the Browns' constitutional deprivations. Wilson County's failure to train Cicherski amounted to deliberate indifference to the rights and welfare of Wilson County's citizens, including the Browns.

106. Wilson County's policy, practice and custom of allowing an inadequately trained animal control officer to conduct warrantless searches and to apply for seizure warrants without probable cause proximately caused violations of the Browns' Fourth, Fifth and Fourteenth Amendment rights.

V. ABUSE OF PROCESS

107. Paragraphs 33-95 are incorporated herein.

108. The Browns plead additionally and in the

alternative the following: The Animal Activists and the Television and Newspaper Defendants (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), Conover, unidentified animal activists, and, in their individual capacities and outside the scope of their lawful authority, Cicherski, Tull and Wilson (collectively "Tortfeasors"), illegally and improperly misappropriated government resources and perverted the use of a legal process that was neither warranted nor authorized by the process. The Tortfeasors were motivated by ulterior motives unrelated to the legal process. The Browns suffered damage as a result of the irregularity in the use of the process; the Tortfeasors' abuse of the legal process caused wrongful seizure of the Browns' property and wrongful interference with the Browns.

VI. TRESPASS

109. Paragraphs 33-95 are incorporated herein.

110. The Browns plead additionally and in the alternative the following: Cicherski, SARA, and Judy Gossett physically entered the Browns' property and exceeded the scope of permission granted to them under the guise of prospective puppy purchasers on or about December 22, 1996.

111. On January 2, 1997, the Trespassers physically entered the Browns' property without authorization.

112. Defendants Cicherski, Sheriff's Deputies, and all defendants acting under color of state law committed trespass by executing their authority to physically enter the Browns' property in an unlawful manner.

VII. INVASION OF PRIVACY

113. Paragraphs 33-95 are incorporated herein.

114. The Browns plead additionally and in the alternative the following: Wilson County, Cicherski, Wilson, the Sheriff's Deputies, the Television Defendants and Animal Activists (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), Deason, Conover, and never identified animal activists intentionally intruded upon the private affairs and/or solitude of the Browns in a manner – without permission, in the company of dozens of other intruders, with television cameras rolling – that was highly offensive to the Browns and would be highly offensive to any reasonable person.

VIII. CONVERSION

115. Paragraphs 33-95 are incorporated herein.

116. The Browns plead additionally and in the alternative the following: the Browns have a property interest in their animals, livestock and images. Wilson County, Cicherski, Wilson, the Sheriff's Deputies, the

Television Defendants and Animal Activists (including their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), Deason, Conover, and never identified animal activists wrongfully assumed and exercised dominion and control over the Browns' property to the exclusion of their rights in their property.

IX. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

117. Paragraphs 33-95 are incorporated herein.

118. The Browns plead additionally and in the alternative the following: Defendants' acts and/or omissions, including those of their agents and employees who were at all relevant times acting within the course and scope of their agency or employment, were intentional and/or reckless. Furthermore, this conduct, as set out above, was extreme and outrageous and caused the Browns severe emotional distress.

X. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIPS

119. Paragraphs 33-95 are incorporated herein.

120. The Browns plead additionally and in the alternative the following: The Tortfeasors intentionally and maliciously, for the purpose of harming the Browns, interfered with the Browns' prospects for future business

in the sale of pure-bred dogs and/or cats. The Browns' lost earnings are the proximate result of the Tortfeasors' actions. The Tortfeasors' actions were undertaken for the purpose of harming the Browns, and proximately and directly caused them actual harm.

XI. CIVIL CONSPIRACY

121. Paragraphs 33-95 are incorporated herein.

122. The Browns plead additionally and in the alternative the following: The Tortfeasors and Patricia Massey conspired to invade the Browns' premises on January 2, 1997. The Tortfeasors and Patricia Massey were in communication prior to January 2, 1997 for the purposes of planning the raid, coordinating their actions, and converging upon the Browns' premises simultaneously. Unlawful, overt acts in furtherance of the conspiracy include, but are not limited to: trespass upon the Browns' premises; depriving the Browns of their property; violation of the Browns' civil rights; conversion of the Browns' property; tortious interference with the Browns' prospective business relationships; and intentional infliction of emotional distress upon the Browns. The Tortfeasors' and Patricia Massey's participation in the conspiracy to invade the Browns' premises proximately caused damage to the Browns.

XII. DEFAMATION

123. Paragraphs 33-95 are incorporated herein.

124. On January 2, January 3, and January 10, 1997, Harte-Hanks Communications, Inc., d/b/a KENS-TV ("KENS-TV"), broadcast defamatory statements that injured the Browns' reputations and exposed them to public hatred, contempt, ridicule, and financial injury. KENS-TV broadcast the Browns' videotaped images along with false imputations of criminal conduct by the Browns: "A raid, officials aren't looking for drugs or weapons, . . ." and "The strong arm of the law is cracking down tonight on a different kind of criminal" and "busted."

125. In the alternative, KENS-TV's statements created an innuendo of criminal conduct that injured the Browns' reputations and exposed them to public hatred, contempt, ridicule, and financial injury.

126. In the alternative, KENS-TV broadcast defamatory statements imputing criminal conduct to the Browns with knowledge of the falsity of the statements and/or with reckless disregard as to the statements' truth.

127. KENS-TV's defamatory statements proximately caused the Browns personal humiliation, loss of reputation in the community at large, loss of reputation in the business community, mental anguish and suffering. In addition, KENS-TV's defamatory statements caused the Browns lost business and profits from the date of the first broadcast and into the future.

XIII. MALICE

128. Paragraphs 33-95 are incorporated herein.

129. The Tortfeasors acted and/or committed omissions evidenced by specific intent to cause substantial injury to the Browns. The Tortfeasors' acts and/or omissions, when viewed objectively from the standpoint of the Tortfeasors at the time of the occurrence, involved an extreme degree of risk, considering the probability and magnitude of potential harm to the Browns, of which the Tortfeasors had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety and welfare of the Browns. In the alternative, the Tortfeasors acted with specific intent to cause substantial injury to the Browns.

XIV. NEGLIGENCE

130. Paragraphs 33-95 are incorporated herein.

131. The Browns plead additionally and in the alternative the following: The Tortfeasors and Patricia Massey assumed a duty by their affirmative course of conduct, which they owed to the Browns. The Tortfeasors and Patricia Massey breached that duty and as a proximate result of the Tortfeasors' negligence, the Browns suffered severe injuries.

132. The Browns further plead that Patricia and Ray Massey, Pam Delabar, Catherine Tull and Dr. Conover are held to a higher standard of care because of their specialized training, knowledge and expertise, and that

Patricia and Ray Massey, Pam Delabar, Catherine Tull and Dr. Conover each breached the applicable standard of care.

133. The Browns were damaged as a proximate result of Patricia Massey's and the Tortfeasors' negligence.

XV. DAMAGES

134. As a proximate result of Defendants' actions (including those of their agents and employees, who at all relevant times were acting within the course and scope of their agency or employment), the Browns have suffered, and more likely than not will suffer, the following damages:

a. Mental anguish in the past and future;
b. Lost income and/or business profits in the past and future;
c. Loss of clients;
d. Medical expenses in the future;
e. Impairment of reputation and standing in the community;
f. Personal humiliation;
g. Reasonable market value of stolen and/or misappropriated personal property;
h. Loss of use of the Browns' personal property;
i. Consequential damages;
j. Attorneys fees;
k. Exemplary and/or punitive damages.

XVI. PRAYER

WHEREFORE, the Browns respectfully pray for a trial by jury in this lawsuit, and that judgment be rendered against the Defendants for the following:

a. Actual damages;
b. Costs of suit;
c. Prejudgment and post-judgment interest;
d. Attorneys' fees;
e. Exemplary and/or punitive damages; and
f. All other relief, both legal and equitable, to which the Browns may be entitled.

Respectfully submitted,

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Certificate of Service [not reproduced in appendix]

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF TEXAS
SAN ANTONIO DIVISION

[Filed February 26, 1999]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN,	)
Plaintiffs	)
	)
v.	)
	)
WILSON COUNTY, et al.,	)
Defendants	)

DEFENDANT WILSON COUNTY AND SHERIFF TACKITT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ORLANDO GARCIA:

NOW COMES the WILSON COUNTY AND SHERIFF JOE TACKITT, Individually and in his Official Capacities, Defendants in the above entitled and numbered

cause, and pursuant to Rule 56, Federal Rules of Civil Procedure and files this their Motion for Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

Defendants WILSON COUNTY and SHERIFF JOE TACKITT, Individually and in his Official Capacity would show unto the Court that there is no genuine issue as to any material fact and that they are entitled to judgment, as a matter of law.

II.

Defendants WILSON COUNTY and SHERIFF TACKITT incorporate into their Motion for Summary Judgment for all purposes the following exhibits:

(1) Exhibit "A" - The Seizure Warrant signed by Justice of the Peace Emilio Flores concerning the Browns' Dogs.

(2) Exhibit "B" - Deposition of Sheriff Joe Tackitt.

(3) Exhibit "C"- Deposition of County Attorney Russell Wilson;

(4) Exhibit "D"- Deposition of Wilson County

Animal Control Officer Joseph Cicherski

(5) Exhibit "E"- Affidavit of Deputy Chief Albert Ortiz.

The above Exhibits "A" - "E" are hereby incorporated by reference for all purposes.

III.

The case at bar concerns execution of a seizure warrant on the Browns' farm wherein they conducted a puppy mill. Justice of the Peace Emilio Flores issued a seizure warrant for 100+ dogs which was executed on January 2, 1997. (See Exhibit "A" - The Seizure Warrant signed by Justice of the Peace Emilio Flores concerning the Browns' Dogs). The search warrant was never executed since consent was given by the Browns to search their residence for the dogs in question. Plaintiffs claim that puppies from their puppy mill were unconstitutionally taken from them resulting in this lawsuit.

On or about December 26, 1996, Wilson County Animal Control Officer Joseph Cicherski under the guise of a potential buyer, visited the Browns' puppy mill, along with two volunteers. Based upon his findings of the wretched condition of the Browns' puppy mill, Animal Control Officer Cicherski called Dr. Tull (the Region 8 State Veterinary in charge of the animal control officers concerning the area in question). Based on the description

of Officer Cicherski to Dr. Tull, immediate action was deemed necessary. Animal Control Officer Cicherski sought the advice of Wilson County Attorney Russell Wilson to draft the legal documents necessary. County Attorney Russell Wilson drafted the affidavits and seizure warrant in question pursuant to the Texas Health and Safety Code, Chapter 821. Russell Wilson further drafted a search warrant and affidavit for search warrant, but this document was not executed since the Browns gave consent. County Attorney Russell Wilson obtained the authorization for the seizure warrant from Justice of the Peace Flores. Animal Control Officer Cicherski along with Deputies Price and Ayala, proceeded to the Browns' property on January 2, 1997 to execute the seizure warrant. The seizure warrant was executed by Deputy Jason Price. Animal Control Officer Cicherski along with various volunteers accompanied him in the seizure of the dogs in question. When the Browns protested the seizure of the dogs, Cicherski called for an independent veterinarian by the name of Dr. Deason to examine the dogs along with the Browns' veterinarian Dr. Brumlow. Ultimately, eight dogs were seized from the Browns' property based on the representations of Dr. Deason. One dog was euthanized and the other seven dogs were later returned pursuant to a Rule 11 agreement between the County and the Browns. (See Exhibit "C" Deposition of County Attorney Russell Wilson, pp. 130, 131).

Plaintiffs further allege that eleven (11) dogs were reported missing on January 20, 1997. Deputy Ayala investigated said report but could find no evidence that any dogs were missing with regard to the issuance of the

seizure warrant. (See Exhibit "B" Deposition of Sheriff Joe Tackitt, pp. 88 - 89). Plaintiffs have alleged causes of action pursuant to 42 U.S.C. §1983, as well as state tort claims based on trespass, invasion of privacy, conversion and intentional infliction of emotional distress.

Defendants assert unto the Court that there is no genuine issue as to any material fact herein and that Wilson County is entitled to judgment, as a matter of law.

IV.
ARGUMENT AND AUTHORITY

Governmental entities such as the Wilson County, can be found liable under 42 U.S.C. § 1983 only where the governmental entity causes the constitutional violation at issue. Respondeat superior will not attach under 42 U.S.C. § 1983, as a matter of law. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

The distinction between the governmental entity and the acts of its employees is preserved - and Respondeat Superior avoided - through an exacting application of *Monell*'s official policy requirement, which provides the governmental entity's liability under 42 U.S.C. §1983 attaches where and only where a deliberate choice to follow a course of action is made from among various alternatives by the official or officials for establishing final policy with respect to the subject matter in question. *Pembauer v. City of Cincinnati*, 475 US. 469, 479 (1986); *Gonzalez v Ysleta Independent School Dist.*, 996 F.2d 745, 759 (5th Cir. 1993). Succinctly stated, 42

U.S.C. § 1983 permits recovery only when it can be fairly said that the governmental entity itself is the wrongdoer. *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *City of Canton v. Harris*, 489 U.S. 378 (1989).

In *Bennett v. City of Slidell*, 735 F.2d 861 (5th Cir. 1984)(en banc) *cert. denied*, 472 U.S. 1016 (1985), the Court defined official policy as:

> (1) A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the governmental entity's law making officers or by an official to whom the law makers had delegated policy making authority; or
>
> (2) A persistent, wide-spread practice of the governmental entity's officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents a governmental entity's policy or constructive knowledge of such Custom must be attributable to the governing body of the governmental entity or to an official to whom that body has delegated policymaking authority.

In order to hold a municipality liable under 42 U.S.C. §1983 for its employees' acts, the Plaintiffs must show that a policy of training, supervising or disciplining

caused those acts. Such a showing requires proof that:

(1) The training, supervision or disciplinary procedures of the municipality's policy maker were inadequate;

(2) The municipality's policy maker was deliberately indifferent in adopting the training, supervising or disciplinary policy; and,

(3) The inadequate training, supervision or disciplinary policy directly caused the Plaintiffs injury.

See City of Canton v. Harris, 489 U.S. 378 (1989); *Baker v. Putnal*, 75 F,3d 190 (5th Cir. 1996); *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir. 1992).

Where the alleged policy is one of inadequate police training, supervision or discipline, the Plaintiffs can only satisfy the first element of municipal liability if the failure to train, supervise or discipline satisfies the "deliberate indifference" standard that applies to supervisor liability. *See, Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996); *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir. 1992).

The United States Supreme Court has recently addressed the issue of municipal liability in *Board of County Commissioners of Bryan County. Oklahoma v. Brown*, 520 U.S. 397 (1997). In Bryan County, the Court

addressed the issue of whether or not the county could be held liable for a sheriffs decision in hiring a deputy sheriff who allegedly committed excessive force. Plaintiff prevailed following a jury trial and the Fifth Circuit affirmed. The United State Supreme Court in reversing the judgment held that the Plaintiff had not established municipal liability under 42 U.S.C. § 1983 and reasoned as follows:

> "As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 Plaintiff merely to identify conduct properly attributable to the municipality. The Plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a Plaintiff must show that the municipal action was taken with a requisite degree of culpability and must demonstrate a direct casual link between the municipal action and the deprivation of federal rights." *Id.* at 639.

The Court went on to hold that Bryan County was not liable for Sheriff Moore's decision in hiring the deputy sheriff under consideration since the Plaintiff had not demonstrated that the Sheriff's decision reflected a conscious disregard for a high risk that the deputy sheriff would use excessive force in violation of Plaintiffs federally protected right.

In short, the test under Bryan County is whether or not the Plaintiffs injury is the "plainly obvious

consequence" of the governmental entity's decision under consideration. *See Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998).

In the case at bar, Defendant Wilson County asserts unto the Court that its training policy regarding all of its deputies officers, including Deputies Ayala and Price, meet and exceed the required training set forth by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE). (See, Exhibit "F" of the Affidavit of Deputy Chief Albert Ortiz).

Furthermore, Defendant Wilson County asserts unto the Court that Animal Control Officer Joseph Cicherski was certified to perform his duties as an animal control officer. (See Exhibit "D" - Deposition of Wilson County Animal Control Officer Joseph Cicherski, pp. 13 -14).

Defendant Wilson County asserts unto the court that Plaintiffs have failed to identify a policy or practice on the part of Wilson County that was a moving force behind the Plaintiffs' alleged injury. Plaintiffs have wholly failed to demonstrate a direct causal link between any municipal action on the part of Wilson County and the alleged deprivation of Plaintiffs' constitutional fights. Plaintiffs have merely made conclusionary allegations, which are insufficient to establish liability on the part of the Wilson County, as a matter of law. *Board of County Commissioners of Bryan County. Oklahoma v. Brown*, 520 U.S. 397 (1997); *Richardson v. Oldham*, 12 F.3d 1373 (5th Cir. 1994); *Huong v. City of Port Arthur*, 961

F.Supp.1003 (E.D. Tex. 1997). Defendant Sheriff Tackitt, in his individual capacity asserts unto the Court that the Plaintiffs have failed to establish liability against him individually under 42 U.S.C. § 1983, as a matter of law. For the Sheriff to be held liable under § 1983, there must be some connection between the Sheriff's actions and the alleged constitutional deprivation at issue. *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986). In *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996), the Court stated that supervisory officials may be held liable only if:

(1) they affirmatively participate in acts that cause constitutional deprivation; or

(2) implement unconstitutional policies that casually result in Plaintiff's injury.

Defendant Sheriff Tackitt would show unto the court that he has not implemented any unconstitutional policies that resulted in Plaintiffs' alleged injuries, as a matter of law. (See, Exhibit "B" - Deposition of Sheriff Joe Tackitt.) Defendant Tackitt asserts unto the Court that the Plaintiffs have failed to establish a sufficient nexus between Sheriff Tackitt's conduct and the alleged violation of Plaintiffs' rights pursuant to 42 U.S.C. § 1983, as a matter of law. *Baker v. Putnal*, 75F.3d 190 (5th Cir. 1996).

V.

Defendant Wilson County and Sheriff Tackitt would further show unto the Court that Plaintiff has alleged pendent tort claim allegations for invasion of

privacy, conversion and intentional infliction of emotional distress, Defendants would show unto the Court that Wilson County has not waived sovereign immunity under the Texas Tort Claims Act under Chapter 101, Section 101.057, as a matter of law. *Campbell v. City of San Antonio*, 43 F.3d 973 (5th Cir. 1995). Defendant Sheriff Tackitt further asserts that he is entitled to official immunity for all of Plaintiffs' allegations, as a matter of law. *Campbell v. City of San Antonio*, 43 F.3d 973 (5th Cir. 1995); *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

WHEREFORE, PREMISES CONSIDERED Defendant WILSON COUNTY and SHERIFF TACKITT prays that their Motion for Summary Judgment be in all things granted, that Plaintiffs' lawsuit be dismissed against them and for such other and further relief as they may show themselves justly entitled.

Respectfully submitted,

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APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS SAN ANTONIO DIVISION

[Filed February 26, 1999]

No: SA-97-CA-1473-OG

ALAN BROWN; LOIS BROWN, Plaintiffs	)
v.	)
WILSON COUNTY, et al., Defendants	)

DEFENDANT DEPUTIES AYALA AND PRICE AND JOE CICHERSKI'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE ORLANDO GARCIA:

NOW COME the WILSON COUNTY DEPUTIES AYALA AND PRICE AND ANIMAL CONTROL OFFICER JOSEPH CICHERSKI, Individually,

Defendants in the above entitled and numbered cause, and pursuant to Rule 56, Federal Rules of Civil Procedure and files this their Motion for Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

Defendant DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI, Individually would show unto the Court tat there is no genuine issue as to any material fact and that they are entitled to judgment, as a matter of law.

II.

Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI, incorporate into their Motion for Summary Judgment for all purposes the following exhibits:

(1) Exhibit "A" - The Seizure Warrant signed by Justice of the Peace Emilio Flores concerning the Browns' Dogs.

(2) Exhibit "B" - Deposition of Sheriff Joe Tackitt.

(3) Exhibit "C" - Deposition of County Attorney Russell Wilson;

(4) Exhibit "D"- Deposition of Wilson County Animal Control Officer Joseph Cicherski

(5) Exhibit "E"- Affidavit of Deputy Chief Albert Ortiz.

(6) Exhibit "F"- Deposition of Deputy Ayala.

(7) Exhibit "G"- Deposition of Deputy Jason Price.

The above Exhibits "A" - "G" are hereby incorporated by reference for all purposes.

III.

The case at bar concerns execution of a seizure warrant on the Browns' farm wherein they conducted a puppy mill. Justice of the Peace Emilio Flores issued a seizure warrant for 100+ dogs which was executed on January 2,1997. (See Exhibit "A" - The Seizure Warrant signed by Justice of the Peace Emilio Flores concerning the Browns' Dogs.). The search warrant was never executed since consent was given by the Browns to search their residence for the dogs in question. Plaintiffs claim that puppies from their puppy mill were unconstitutionally taken from them resulting in this lawsuit.

On or about December 26, 1996, Wilson County Animal Control Officer Joseph Cicherski under the guise

of a potential buyer, visited the Browns' puppy mill, along with two volunteers. Based upon his findings of the wretched condition of the Browns' puppy mill, Animal Control Officer Cicherski called Dr. Tull (the Region 8 State Veterinary in charge of the animal control officers) concerning the area in question. Based on the description of Officer Cicherski to Dr. Tull, immediate action was deemed necessary. Animal Control Officer Cicherski sought the advice of Wilson County Attorney Russell Wilson to draft the legal documents necessary. County Attorney Russell Wilson drafted the affidavits and seizure warrant in question pursuant to the Texas Health and Safety Code, Chapter 821. Russell Wilson further drafted a search warrant and affidavit for search warrant, but this document was not executed since the Browns gave consent. County Attorney Russell Wilson obtained the authorization for the seizure warrant from Justice of the Peace Flores. Animal Control Officer Cicherski along with Deputies Price and Ayala, proceeded to the Browns' property on January 2, 1997 to execute the seizure warrant. The seizure warrant was executed by Deputy Jason Price and Animal Control Officer Cicherski along with various volunteers accompanied him in the seizure of the dogs in question. When the Browns protested the seizure of the dogs, Cicherski called for an independent veterinarian by the name of Dr. Deason to examine the dogs along with the Browns' veterinarian Dr. Brumlow. Ultimately, eight dogs were seized from the Browns' property based on the representations of Dr. Deason. One dog was euthanized and the other seven dogs were later returned pursuant to a Rule 11 agreement between the

County and the Browns. (See Exhibit "C" - The Deposition of County Attorney Russell Wlson, pp. 130, 131).

Plaintiffs further allege that eleven (11) dogs were reported missing on January 20, 1997. Deputy Ayala investigated said report but could find no evidence that any dogs were missing with regard to the issuance of the seizure warrant. (See Exhibit "B" - Deposition of Sheriff Joe Tackitt, pp. 88 - 89). Plaintiffs have alleged causes of action pursuant to 42 U.S.C. §1983, as well as state tort claims based on trespass, invasion of privacy, conversion and intentional infliction of emotional distress.

Defendants assert unto the Court that there is no genuine issue as to any material fact herein and that Wilson County is entitled to judgment, as a matter of law.

IV.
ARGUMENT AND AUTHORITY

Defendant DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI, assert unto the Court that all of their actions on the date of the incident in question were the actions of reasonable officers and were undertaken in good faith. See Exhibit "D" - Deposition of Animal Control Officer Joseph Cicherski, pp.338-339; Exhibit "E" - Affidavit of Deputy Chief Albert Ortiz; Exhibit "F" Deposition of Deputy Christopher Ayala and Exhibit "G" - Deposition of Deputy Jason Price.) Defendant DEPUTIES AYALA AND PRICE

and ANIMAL CONTROL OFFICER CICHERSKI are immune from both suit and liability unless it is shown that at the time of the incident, they violated a clearly established constitutional right of the Plaintiffs herein. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Anderson v. Creighton*, 483 US. 635 (1987), the Court set out the standard that qualified immunity shields a governmental officer while performing discretionary functions from civil liabilities as long as their actions could have reasonably have been thought consistent with the rights they are alleged to have violated. In *Siegert v. Gilley*, 500 U.S. 226 (1991), the Court set out the analytical structure under which a claim of qualified immunity should be addressed by establishing the two-pronged test as follows:

(1) has the Plaintiff alleged a violation of a clearly established constitutional right; if he has,

(2) was the Defendant's conduct in question objectively reasonable.

Under this analysis, a Defendant's conduct may in fact have violated Plaintiffs' civil tights under 42 U.S.C. § 1983, but the Defendant may nevertheless avoid individual liability by successfully asserting the qualified immunity defense. *Mouille v. City of Live Oak, Texas*, 977 F.2d 924 (5th Cir. 1992); *Melear v. Spears*, 862 F.2d 1177 (5th Cir. 1989).

Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI assert unto the Court that they were executing a facially valid seizure warrant and therefore were legally on the Browns' property at the time of the seizure in question. (See, Exhibit "A" - The Seizure Warrant signed by Justice of the Peace Emilio Flores concerning the Browns' Dogs; Exhibit "B" - Deposition of Sheriff Joe Tackitt; Exhibit "C" - Deposition of County Attorney Russell Wilson.)

Defendants would show unto the Court that the Plaintiffs assert in their Third Amended Petition that the seizure warrant for the dogs was obtained by false statements and/or were recklessly prepared. (See Paragraph 72 of Plaintiffs Third Amended Complaint.) Under *Siegert*, the first consideration is whether or not the Plaintiffs allege a Fourth Amendment violation with regard to the false information claim. The Supreme Court in *Franks v. Delaware*, 438 U.S. 1544 (1978), established that an officer is liable for swearing to false information in an affidavit provided that:

(1) the affiant knew the information was false or would have known it was false except for the officer's reckless disregard for the truth;

(2) the warrant would not establish probable cause without the false information.

The Court further held that allegations of negligence or innocent mistake are insufficient to state a

cause of action. *Id.* at 171.

In the case at bar, the squalor that the dogs were living in while on the Brown property, including feces infected food and algae contaminated water would lead a reasonably competent officer to believe that an offense had been committed. (See, Exhibit "D" - Deposition of Animal Control Officer Joseph Cicherski.)

Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI assert that the objective standard of Harlow applies to claims of unlawful search under the circumstances presented in this case. Only where the warrant application is so lacking and indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost. *Malley v. Briggs*, 475 U.S. 335 (1986). The crucial issue is whether a reasonably well trained officer in the Defendants' position would have know that the affidavit failed to establish probable cause and that he should not have applied for the warrant. *Hart v. O'Brien*, 127 F.3d 424, 445 (5th Cir. 1997). In the case at bar, the application for seizure warrant was not so lacking of the indicia of probable cause as to render the application for said seizure warrant unreasonable. (See, Exhibit "E" - Affidavit of Deputy Chief Albert Quiz.) The Supreme Court in *Hunter v. Bryant*, 502 U.S. 224 (1991) stated that qualified immunity gives ample room for mistake in judgments by protecting all but the plainly incompetent or those who knowingly violate the law. From an objectively reasonable standard, Defendant Cicherski acted reasonably in

applying for a seizure warrant and indeed one was issued by Justice of the Peace Flores. Defendants Ayala and Price acted upon a facially valid seizure warrant which was executed on the Brown property. The seizure in question was reasonable since Deputies Ayala and Price were executing a facially valid seizure warrant. As the Court stated in *Hart v. O'Brien*, 127 F.3d 424, 445 (5th Cir.1997):

> "The officers may have been negligent in their investigation, and wrong to conclude that they had probable cause. However, negligence is insufficient to create liability for police officers under *Malley*. Therefore, we find that O'Brien is protected by qualified immunity."

In the case at bar, Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI could lawfully have seized over 100 dogs on the Browns' property. However, based on their discretionary actions, only eight dogs were seized. This seizure was reasonable, as a matter of law. *Hunter v. Bryant*, 502 U.S. 224 (1991); *Hart v. O'Brien*, 127 F.3d 424, 445 (5th Cir, 1997).

Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI further assert that the Plaintiffs have put forth no evidence that eleven dogs were taken outside the scope of the seizure warrant. Defendant Ayala conducted a reasonable investigation subsequent to the Browns' complaint and

found no evidence that any dog was purloined from the Brown property. Defendant DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI, in their individual capacities are entitled to the protective shroud of qualified immunity for all of Plaintiffs' allegations, as a matter of law. *Hunter v. Bryant*, 502 U.S. 224 (1991); *Malley v. Briggs*, 475 U.S. 335 (1986); *Hart v. O'Brien*, 127 F.3d 424, 445 (5th Cir. 1997).

Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI assert that they are entitled to official immunity for Plaintiffs' state tort allegations since they were performing their discretionary duties in good faith in the course and scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

Plaintiffs' claims based on Texas state tort allegations including intentional infliction of emotional distress fail, as a matter of law. *Hart v. O'Brien*, 127 F.3d 424, 452 (5th Cir. 1997).

WHEREFORE, PREMISES CONSIDERED Defendants DEPUTIES AYALA AND PRICE and ANIMAL CONTROL OFFICER CICHERSKI pray that their Motion for Summary Judgment be in all things granted, that Plaintiffs' lawsuit be dismissed against it and for such other and further relief as it may show itself justly entitled.

Respectfully submitted,

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